TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 105

THE BARRETT COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED MAY 11, 1926

(31,160)

(31,160)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 450

THE BARRETT COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

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[fol. 1] **IN COURT OF CLAIMS OF THE UNITED STATES**

No. A-107

THE BARRETT COMPANY

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On November 4, 1921, the plaintiff filed its original petition.

Subsequently, to wit, on Sept. 25, 1922, by leave of court, the plaintiff filed its amended petition.

Subsequently, to wit, on August 2, 1923, by leave of court, the plaintiff filed its Second Amended Petition. Said Second amended Petition is as follows:

II. Second Amended Petition—Filed Aug. 2, 1923

To the Honorable the Court of Claims:

The claimant, The Barrett Company, respectfully represents:

I. It is a corporation organized under the laws of the State of New Jersey with its principal business office in the City of New York, State of New York.

II. On the 17th day of June, 1918, it entered into a formal contract with the United States, represented by S. McGowan, Paymaster General, Chief of the Bureau of Supplies & Accounts, Navy Department, whereby it undertook, with funds provided by the United States to erect a plant at Frankford, Pa., for the distillation of xylol at the rate of 225,000 gallons per month and, after completion, to operate said plant until a total of 2,700,000 gallons of xylol had been produced. A copy of said contract is attached to the original petition marked Exhibit A and is made a part hereof.

III. In advance of the making of said contract, The Barrett Company had submitted an estimate of the cost of the plant and acces- [fol. 2] sories required to produce 225,000 gallons per month of xylol and by the terms of said contract it was agreed that the Navy Department would advance to The Barrett Company "a sum equal to the approved estimated cost of said plant." The cost of the plant as estimated by The Barrett Company in advance of the making of said contract was $253,321.12 and this estimate was approved by the Chief of the Bureau of Ordnance, Navy Department, acting for the Navy Department.

IV. The xylol to be produced in said plant was to be made by fractionating special solvent naptha furnished by the Navy Department in sufficient quantity to permit the production of at least 225,000 gallons of xylol per month. The price to be allowed and paid the contractor for the production of xylol was covered by paragraph 5 of the contract as follows:

"5. Price: The price to be paid by the Navy to The Barrett Company shall be determined monthly for the preceding month for actual deliveries of xylol made during each calendar month as follows:

"To cover the cost of the said plant and equipment, there shall be a charge per gallon of xylol, to be determined by pro-rating the said total approved estimated cost against 2,700,000 gallons of xylol to be made under this contract. At the same time that this charge is made, the account of the Navy shall be credited therewith in as much as the total approved estimated cost will have been advanced to The Barrett Company before the production of xylol has been commenced.

"To cover operating costs there shall be a charge of 3 cents per gallon of special solvent naphtha distilled, and an additional charge for redistillation of any fractions produced from the first run of the special solvent naptha of 3 cents per gallon of such fractions distilled. Multiply the above charges per gallon by the respective amounts of special solvent Naptha and fractions thereof distilled, and divide the resultant aggregate total sum of money by the num-
[fol. 3] ber of gallons of xylol produced during the months, and add 6.6 cents per gallon of such xylol to cover overhead, profits and use of patents."

V. By paragraph 7 of said contract it was provided:

"7. Duration of Contract: It is understood that The Barrett Company is to use its best endeavors, with the assistance of the Navy, to have said plant and equipment ready for operations within five months from the date of the contract, and that the contract shall continue in full force and effect until 2,700,000 gallons of xylol shall have been delivered to E. I. du Pont de Nemours & Co. as hereinafter stipulated."

Claimant used every diligence to complete, and actually completed, said plant ready for operation within the time stipulated and, after the same was ready for operation, proceeded to operate it with efficiency in accordance with the contract. Claimant was ready, willing and able to produce xylol strictly in accord with its undertaking, but, without fault, neglect or dereliction on its part and solely to meet the convenience of the Government, the Navy Department on or about November 16, 1918, ordered the suspension of further operations under the contract and failed thereafter to furnish any more special solvent naphtha for distillation into xylol by claimant. Thereby the further operation of the contract was terminated. At that time a total of 191,330 gallons of xylol had been produced and

delivered by the claimant. Claimant was paid for said amount of xylol as provided by the contract.

VI. Claimant had at the last mentioned date expended large sums for the performance of this contract for which no reimbursement had been made to it except to the extent of the reimbursement made in [fol. 4] the price paid for the number of gallons delivered as aforesaid. Such expenses were and are losses to claimant resulting from the termination aforesaid of the operation of the contract. Claimant would have recovered such losses, and in addition, realized profits from the performance of the whole contract had the same not been terminated as aforesaid.

VII. If this contract had been completely performed, the profits which claimant would have made upon payment as agreed upon, on delivery of the total amount of 2,700,000 gallons of xylol, over and above all its expenses, including the expenses herein detailed, and after making reasonable allowance for the costs, care, trouble, risk and responsibility attending a full execution of the contract, would have been $179,134.20.

VIII. The losses suffered by the claimant, after deducting the amounts ratably reimbursed by the payments for the 191,330 gallons delivered, are as follows:

(a) Notwithstanding every effort to erect the plant at the lowest possible cost, claimant in order duly to perform its said contract for the production of xylol was required to and did expend in excess of the approved estimated cost and in excess of the sum advanced by the Navy Department to cover such cost, the sum of $83,019.24 as direct costs, and $18,522.61 as overhead properly apportionable to said contract, forming a part of the expense thereof, a total of $101,542.05, of which $7,195.59 was reimbursed to claimant in the payments made to it for the xylol delivered, leaving the sum of $94,346.46 as a loss aforesaid.

(b) Claimant was required to and did furnish a surety bond in the penal sum of $270,000 at a cost of $2,700, conditioned on the [fol. 5] faithful performance of its contract. It was reimbursed therefore only to the extent of $191.23 in the payments aforesaid, leaving the sum of $2,508.67 as a loss aforesaid.

(c) Claimant was required to and did take out and carry fire and other insurance for the protection of the plant and appliances belonging to the Government, and paid premiums thereon of $9,810.26. Claimant was reimbursed therefor only to the extent of $694.18 in the payments aforesaid, leaving the sum of $9,115.08 as a loss aforesaid. After the termination of the contract aforesaid, the sum of $5,124.13 was returned to claimant by the insurance companies, leaving the sum of $3,990.95 as a final loss as aforesaid.

(d) It was necessary in connection with the performance of this contract to carry on certain experimental work in order to secure the production of the quality of xylol required by the Navy under said

contract. The cost thereof was $3,932.60. It was reimbursed therefor in the sum of $278.75 by the payments aforesaid, leaving the sum of $3,653.85 as a loss aforesaid.

(e) After the termination aforesaid, claimant was obliged to handle and unload special solvent naphtha and other government materials, to remove waste material and to put the plant in proper condition for due preservation at a cost of $905.82. It was reimbursed therefor in the sum of $64.21 by the payments aforesaid, leaving the sum of $841.61 as a loss aforesaid.

The total of the sums aforesaid, is $105,341.54.

IX. By paragraph 2 of the contract, it is provided as follows:

(c) All by-products and residues obtained from said special solvent naphtha, excepting such as the Navy may wish to retain, shall become the property of The Barrett Company as a part of its profit, provided, however, that:

[fol. 6] "(1) The said Company shall not use said by-products and residues otherwise than for disposal to third parties without the written consent of the Navy.

"(2) There shall be credited to the account of the Navy, within sixty days after the time of such disposal to third parties, ninety per cent of the disposal value of all such by-products and residues as become the property of The Barrett Company in accordance with the provisions of this clause, less a charge of one per cent per gallon for rental of containers used for shipment.

"(3) The Navy shall give The Barrett Company at least ninety days' notice in writing of its intention to retain possession of any such by-products and residues."

In addition to the profits hereinbefore set forth, claimant could and would have earned additional profits on the handling and sale for the Navy Department of the by-products and residue resulting as above described. The Navy Department never at any time retained, or expressed a wish to retain, any of such by-products and residue and the contractor, on the terms set forth in the contract, had and would have continued to have, the exclusive right to sell and dispose of all such, and in so doing could and would have earned a net profit, after deducting all actual expenses of sale, of $18,875.00.

X. The act of Congress of June 15, 1917, Ch. 29, 40 Stat. 182, provides:

"The President is hereby authorized and empowered within the limits of the amounts herein authorized—

"(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

[fol. 7] "(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

* * * * * * *

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time:"

The authority conferred upon the President, under this act, was by him delegated to the Secretary of the Navy in an order dated August 21, 1917, so far as in furtherance of the production, purchase and requisitioning of materials for construction of vessels for the Navy and for war materials, equipment and munitions required for the use of the Navy.

XI. Claimant claims the "just compensation" provided by the act of Congress aforesaid for the cancellation of the contract aforesaid and asserts that the same should be measured as follows:

(a) Notwithstanding the authority conferred upon the Secretary [fol. 8] of the Navy by the act of Congress and the order of the President aforesaid, the contract aforesaid expressly provides in paragraph 7 as set forth in paragraph V of this petition, that it should continue in full force and effect until the total 2,700,000 gallons of xylol should be delivered as stipulated. By this provision claimant was assured that this contract was not made subject to the termination of the war and to the exercise of the authority to cancel aforesaid and entered into said contract upon this assurance. Wherefore claimant avers that the measure of just compensation under this contract is the amount of the profits which claimant would have earned had the United States carried out its express stipulation aforesaid, to wit, the sum of $179,134.20, set forth in paragraph VII hereof and the sum of $18,875.00 set forth in paragraph IX hereof, a total of $198,009.20.

(b) If such measure of compensation be not deemed by this court to be the "just compensation" provided by said act of June 15, 1917, claimant then avers that the statute requires repayment to

claimant of all the losses incurred in carrying out said contract, as set forth in paragraph VIII hereof, to the amount of $105,341.54.

XII. Following the suspension of the work, the claimant presented to the Navy Department its claim on the several accounts in substance as above set forth, but it excluded from such claim the item of profits that would have accrued had full performance been permitted, for the reason that it was the practice of the Navy Department well known to claimant to refuse to allow any such item of claim in making settlement of suspended or terminated contracts and claimant was willing to dispose of the matter on the [fol. 9] basis offered by it, provided prompt settlement accordingly was secured. The Navy Department offered on May 9, 1919, to allow certain items amounting to $11,856.97, including the items of surety bond, insurance and handling charges, but on March 11, 1920, revised said proposition and offered a settlement to the amount of $4,565.05, including only insurance and handling charges. It also refused to settle the conceded items except upon the giving by claimant of a full release of all claims growing out of the contract with claimant. The proposition of settlement so made was unsatisfactory to claimant but no offer was made by the Secretary of the Navy or other authority to pay seventy-five per centum (75%) or any other sum on account thereof.

XIII. Negotiations subsequently were entered into between claimant and the Navy Department for the purchase of the plant and on December 1, 1920, an agreement supplementary to the original contract was concluded whereby the contractor purchased the plant from the United States, it being specially agreed that this transaction was to be without prejudice to " the right of the contractor to secure payment of claims in settlement for the termination of the original contract No. 38,925 by the Government." A copy of said supplementary contract is annexed to the original petition marked Exhibit B.

XIV. This claim arose on November 16, 1918, upon the date of termination of the contract by order of the Secretary of the Navy as set forth in paragraph V, but no payment of any amount in settlement of the just compensation allowed by law therefor has ever been made. Claimant avers that the just compensation to which it is entitled under said statute is the full and perfect equivalent [fol. 10] of the property in said contract taken from claimant by the act of cancellation and that this requires that claimant should be put in as good a position pecuniarily as it would have been if its property right in said contract had not been cancelled. Claimant is therefore entitled to such addition to the sums aforesaid as will produce the full equivalent of the value of its property, if paid contemporaneously with the taking. Claimant therefore claims in addition to the sums hereinbefore claimed interest at six per cent from November 16, 1918, until the date when payment of said sums may be made.

XV. No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States.

And the claimant claims just compensation as follows:

Under paragraph VII	$179,134.20
Under paragraph IX	18,875.00
A total of	$198,009.20;

Or as losses under paragraph VIII, $105,341.54.

Claimant further claims judgment for interest upon either of said sums until payment thereof.

King & King, Attorneys for Claimant.

[fol. 11] Sworn to by R. V. Mohon. Jurat omitted in printing.

[fol. 12] EXHIBIT "A" TO PETITION

N. S. A. 527.
38925.

Navy Department, Bureau of Supplies and Accounts

Affidavit

I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with The Barrett Company, that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said The Barrett Company or any other person; and that the papers accompanying abstract dated———, 191—, include all those relating to the said contract, as required by the statute in such case made and provided.

S. McGowan, Paymaster General, U. S. N.

On this 27 day of September, A. D. 1918, before me, E. B. Barr, a Notary Public, personally appeared S. McGowan, Paymaster General, U. S. N., and made and subscribed the foregoing affidavit.

E. M. Barr, Notary Public. (Seal.)

NB—031.
N. S. A. 535.
Contract No. 38925. Opening, —— —, 19—.

[All correspondence relative to inspections, deliveries, damages, payments, etc., hereon, must refer to the above contract number and the number of the class concerned.]

This contract, of two parts, made and concluded this 17 day of June, 1918, A. D. 19—, by and between The Barrett Co., 17 Battery Place, of New York, in the State of N. Y., party of the first part, and the United States, by the Paymaster General United States Navy (Chief of the Bureau of Supplies and Accounts), acting under the direction of the Secretary of the Navy, party of the second part, Witnesseth, That, for and in consideration of the payments herein- [fol. 13] after specified, the party of the first part, for itself and its personal and legal representatives, doth hereby covenant and agree to and with the party of the second part, as follows, viz:

1. That it, the said party of the first part, will furnish and deliver, at its own risk and expense, the following classes of articles, at the place and within the time stated for each class, and at the price set opposite each item as appended hereto, respectively:

General Conditions Governing This Contract

Liquidated Damages

1. Liquidated damages for delayed delivery provided by paragraph 3 of the contract form will not apply to this contract.

Information About Location of Material

2. Information giving exact address of manufacturer or place where finished material is in stock is stated on the blank lines under each class for information of navy yards, and for the purpose of facilitating inspection.

Inspection

3. Inspection is to be at navy yard, or place of manufacture, as directed by bureau concerned if not already stated in the contract.

If inspection is to be at navy yard only, the Government to bear expense of inspection, except for value of sample used in case of rejection of material.

If inspection is to be made at place of manufacture, the following provisions will apply:

(a) The cost of inspection, when not otherwise stated, is to be paid by the Government, but in case it is necessary to handle the material and prepare test specimens to determine quality, the expense incurred thereby shall be paid by the contractor.

(b) Where unauthorized shipment is made before Government inspection, the Government reserves the right to return the material to the place of manufacture at contractor's expense for inspection.

(c) Where useless trips of inspector are caused by incorrect in-
[fol. 14] formation given by the contractor, the Government reserves the right to charge expense of said trips to said contractor and to deny inspection at the plant.

(d) If the contract is sublet, the contractor and subcontractor shall furnish the inspector representing the bureau concerned in their district quadruplicate copies of all orders placed with the manufacturers for materials, providing specifications, and stating when possible the purpose of each item ordered. Such orders shall be considered suborders and contain the number of original contract. In case material requires special treatment after leaving the manufacturer's works, other than machining, such orders must state explicitly the nature of the treatment.

Contractor Given Aid in Securing Delivery of Material When Previously Requested in Bid

4. If contractor required a priority certificate or aid in securing additional equipment in order to make promised deliveries, this fact will be stated in the proposal.

United States Contracts Must Have Preference

5. The contractor will be required to give performance of this contract precedence over all other contracts, except prior contracts involving the preparation of war material for the United States or the allies of the United States, unless specially superseded by a priority certificate.

Changes of Drawings and Specifications May be Made by the Government with Adequate Compensation

6. The Government, in case of necessity, may by a written notice to contractor at any time, make a reasonable change in the drawings and specifications or provision in this contract. If any changes are made involving additional expense or reduction in labor and material, it is understood a mutually satisfactory adjustment will be made. Any such claim must be based upon an order in writing.

Provisions for Reimbursement of Contractor When Additional Expense is Incurred in Handling or Shipment of Material

[fol 15] 7. If the Government directs a change in the place or manner of delivery, it is understood that the contractor will be promptly paid for any expense so incurred over and above the expense to which the said contractor is obligated by the terms of this contract. Such expense to include additional handling, drayage, freight or express charges, and any increase to these charges due to war taxes. Reimbursement will be expedited if contractor's invoices will substantiate such increases by submitting such drayage, freight

or express receipts and the war tax receipts, as the case may involve. The invoices and receipts are to be accompanied with a copy of the Government's orders changing place or manner of shipment.

Contract 38925
The Barrett Company.
Reference: Bu. Reqn. 844 (Ord.).
Appropriation: "Reserve Ordnance Supplies 1917-1918."
2,700,000 Gallons of Xylol.

1. Plant: The Barrett Company shall construct at Frankford, Pennsylvania, for the Navy, a plant with sufficient distillation apparatus and the necessary accessories to enable it to fractionate sufficient special solvent naphtha to produce at least 225,000 gallons per month of Xylol for the Navy Department, provided the Navy will advance to the Barrett Company a sum equal to the approved estimated cost of said plant.

With the exception of such parts of the said plant and equipment needed for the supply of electric power, steam, water, and light as will not be distinctly separable from existing plant and equipment of The Barrett Company, the xylol plant to be constructed and equipped for the Navy as contemplated herein shall be an entirely separate unit to be erected as an annex to already existing distillation equipment belonging to The Barrett Company, and it shall be distinctly separated from any buildings of said Company by an adequate party wall, through which the necessary openings may be provided.

[fol. 16] The estimated cost, to be submitted to the Navy for approval prior to the execution of the contract, shall consist of two parts:

(a) An itemized estimate to cover the cost of said separate unit plant and equipment.

(b) An itemized estimate to cover the cost of such parts of the said plant and equipment needed for the supply of electric power, steam, water, and light, as will not be distinctly separate from existing plant and equipment of The Barrett Company.

2. Special Solvent Naphtha: The special solvent naphtha above referred to shall be a refined distillate conforming to specifications to be later mutually agreed upon and made a part of this contract. It shall be furnished by the Navy in sufficient quantity to permit the production of at least 225,000 gallons of xylol per month. The Barrett Company now estimates that approximately 2.5 gallons of special solvent naphtha are required for each gallon of xylol. The Navy shall have at least sixty days' notice of any variation of this estimate of the amount of special solvent naphtha required.

The said special solvent naphtha shall be delivered to The Barret Company on the following terms:

(a) It shall be delivered only for the purpose of extracting therefrom xylol of the grade and for the use contemplated herein.

(b) Title to said special solvent naphtha, and to all xylol produced therefrom, shall be and remain at all times in the Navy.

(c) All by-products and residues obtained from said special solvent naphtha, excepting such as the Navy may wish to retain, shall become the property of The Barrett Company as a part of its profit, provided, however, that—

(1) The said Company shall not use said by-products and residues otherwise than for disposal to third parties without the written consent of the Navy.

(2) There shall be credited to the account of the Navy, within [fol. 17] sixty days after the time of such disposal to third parties, ninety per cent of the disposal value of all such by-products and residues as become the property of The Barrett Company in accordance with the provisions of this clause, less a charge of one cent per gallon for rental of containers used for shipment.

(3) The Navy shall give The Barrett Company at least ninety days' notice in writing of its intention to retain possession of any such by-products and residues.

3. Xylol: In fractionating the special solvent naphtha received as above stipulated, The Barrett Company shall produce the maximum possible amount of xylol of the grade to be specified by the Navy at the time the contract is made, and guarantees to produce either as such xylol fraction or as by-products 92½ per cent of the special solvent naphtha received.

4. Delivery: When inspected and accepted as stipulated in Section 11 below, the xylol fraction is to be delivered f. o. b. tank cars, Frankford, Pennsylvania, ready for shipment to Barksdale, Wisconsin. Tank cars having sufficient aggregate capacity shall be furnished by the Navy, but said tank cars shall be operated and their movement cared for by The Barrett Company for the account of the Navy and shall be used exclusively for the shipment of said xylol from Frankford, Pennsylvania, to E. I. du Pont de Nemours and Company, Barksdale, Wisconsin.

An account of payments actually made incident to the operation of said tank cars as above stipulated shall be submitted monthly to the Navy Cost Inspector. Upon approval of such accounts The Barrett Company shall be reimbursed without unnecessary delay.

5. Price: The price to be paid by the Navy to The Barrett Company shall be determined monthly for the preceding month for actual deliveries of xylol made during each calendar month as follows:

To cover the cost of the said plant and equipment, there shall be a charge per gallon of xylol, to be determined by prorating the said [fol. 18] total approved estimated cost against the 2,700,000 gallons of xylol to be made under this contract. At the same time that this

charge is made, the account of the Navy shall be credited therewith inasmuch as the total approved estimated cost will have been advanced to The Barrett Company before the production of xylol has been commenced.

To cover operating costs there shall be a charge of three cents per gallon of special solvent naphtha distilled, and an additional charge for redistillation of any fractions produced from the first run of the special solvent naphtha of three cents per gallon of such fractions distilled. Multiply the above charges per gallon by the respective amounts of special solvent naphtha and fractions thereof distilled, and divide the resulting aggregate total sum of money by the number of gallons of xylol produced during the month, and add 6.6 cents per gallon of such xylol to cover overhead, profit, and use of patents.

6. Payment: One-half of the sum to be advanced for construction purposes shall be paid The Barrett Company at the time of the execution of the contract, and the balance of said amount shall be paid two months thereafter.

The purchase price, as set forth under Section 5 above, shall be payable monthly on presentation of invoices covering such lots of finished xylol as were accepted and delivered during the preceding month.

7. Duration of Contract: It is understood that The Barrett Company is to use its best endeavors, with the assistance of the Navy, to have said plant and equipment ready for operation within five months from the date of the contract, and that the contract shall continue in full force and effect until 2,700,000 gallons of xylol shall have been delivered to E. I. du Pont de Nemours and Company as hereinafter stipulated.

8. Extension or New Orders: The Navy shall have the right to extend this contract beyond the time required for performance and for a greater amount and in the event of such extension, or of new orders immediately following which will require not less than 25 per cent of the capacity of the plant contemplated herein, the Barrett Company shall undertake the manufacture of xylol upon an [fol. 19] equitable basis, depending on increased or decreased cost of operation, it being understood that the Navy shall give The Barrett Company at least sixty days' notice of the intention to extend this contract or place such orders.

9. Ownership of Plant: The entire plant and equipment contemplated herein shall be the property of the Navy Department.

Immediately upon the conclusion of this contract The Barrett Company guarantees that it will offer the Navy for the separate unit plant contemplated under paragraph (a) of Section 1 above, 25 per cent of its original appoved estimated cost; and that at the same time it will also offer the Navy for the portion of the plant and equipment contemplated under paragraph (b) of said Section 1, 25 per cent of its original approved estimated cost. Whether or not the Navy accepts either one or both of said offers, it is understood and

agreed that the Navy shall have the right to rent for Government use only, on a fair and just basis such real estate and plant equipment, together with such rights of way and user rights, as will be necessary for the proper operation of said plant for the production of xylol or the removal of said plant from the premises of The Barrett Company, if its ownership is retained by the Navy and operation is not intended.

10. Fires and Accidents: It is understood that The Barrett Company now anticipates no difficulty in securing complete insurance, and that it will use its best endeavors to secure and will assume the cost of insurance against all fires and accident risks, including both life and property, insofar as insurance is obtainable in commercial companies. Should it be impossible to obtain complete protection by such insurance, it is understood that The Barrett Company will reduce accordingly the price to be paid fr xylol by the Navy.

11. Inspection: All materials and finished product shall at all times be subject to inspection by the Navy's duly authorized representatives, and they shall have power to reject any unfit material and forbid the use thereof in the manufacture of the xylol, and their [fol. 20] approval of all finished product shall be necessary to the acceptance thereof. Their inspections shall be made and decisions rendered as soon as practicable and without unnecessary delay and their decisions shall be final, and The Barrett Company shall promptly replace without cost to the Navy all xylol rejected by such representatives.

12. Shipments: Shipments of contemplated xylol, after inspection and acceptance, shall be made to E. I. du Pont de Nemours and Company at Barksdale, Wisconsin, in accordance with the instructions of a designated representative of the Navy. The Barrett Company, at its own expense, but at the risk of the Navy, shall safely and adequately store the accepted xylol for not more than four weeks from the date any such xylol is completed and submitted for final inspection.

13. Delayed Deliveries: In case The Barrett Company is prevented from delivering any or all of the xylol as herein provided by reason of causes beyond its control or by reason of inability to obtain essential materials to be used in the manufacture thereof, or by reason of labor shortage or labor troubles, it shall be excused from making delivery of xylol while prevented from so doing by any one or more of the causes aforesaid, and all such xylol shall be delivered as soon as practicable after such disability is removed; provided, that as to any xylol not delivered within six (6) months after the time it should have been delivered as herein provided, the Navy shall have the right to cancel without recourse all such deliveries whereupon The Barrett Company shall promptly repay any moneys which it may have received on account of the purchase price thereof, excepting any moneys advanced to construct and equip the plant herein contemplated.

Should The Barrett Company be unable to operate at any time, either in whole or in part, due to the non-receipt of special solvent naphtha, by reason of the negligence on the part of the Navy, it shall be paid for each gallon short of 225,000 gallons per month, which The Barrett Company can show it was unable to produce [fol. 21] because of the above cause alone, 3¾ cents per gallon to cover continued overhead charges and expenses of retention of labor during such period, this payment to be in addition to the price paid for any quantities accepted and delivered during the same calendar month; and said sum of 3¾ cents per gallon is agreed upon as liquidated damages due Barrett on account of said unemployed period; it is understood that the Navy shall not be liable to make such additional payments for failure to provide the required special solvent naphtha by reason of any causes beyond its control, but shall only be liable to make such payment for failure to provide such special solvent naphtha by reason of its negligence in failing to employ all reasonable means within its power.

14. Patent Liability: The Barrett Company shall indemnify the Navy, and all persons acting under it, for all liability on account of the use of any patent rights granted by the United States upon any device or machine installed by the Barrett Company in said plant.

15. Inspection of Books and Accounts: The Barrett Company shall keep, or cause to be kept, entirely separate, full and accurate accounts and records pertaining to the construction of the plant contemplated herein, and of all expenses proratable thereto. The said Company shall also keep separate records of all quantities of special solvent naphtha furnished by the Navy and all xylol and other products obtained therefrom. No change shall be required in the present methods and principles of keeping other records, accounts and costs pertaining to the work under the contract, provided the Navy finds them adequate for the convenient and accurate determination of the proper charges against the Navy.

All accounts and records pertaining to the work under the contract shall at all times be available for inspection by the Navy and its representatives, and such statements and returns relative thereto shall be made as directed by the Navy. All accounts and records pertaining to this contract shall be treated as confidential, and shall be preserved until at least two years have elapsed after the final settlement hereunder.

[fol. 22] 16. Bond: The Barrett Company shall furnish a bond, with surety satisfactory to the Navy, for the faithful performance of this contract in an amount equal to the total approved estimated cost of construction to be advanced by the Navy.

2. It is hereby mutually and expressly covenanted and agreed by and between the parties hereto that the article or articles to be furnished or services to be performed under this contract shall conform in all respects to the requirements of the specifications hereunto annexed, which specifications, the "Instructions, Deliveries, and Con-

ditions," [illegible] the proposal of the said party of the first part, [illegible] and taken as forming a part of this contract with like operation and effect as if the same were incorporated herein; and, in any case where the specifications do not explicitly provide to the contrary, all workmanship and materials entering into the manufacture or construction of any article or articles under this contract, shall be of the very best commercial quality and manufacture; and said article, articles, or services shall upon delivery or completion, be subject to inspection and examination by the officer or officers authorized by the said party of the second part to inspect and examine the same; and no article furnished or services performed under this contract shall be accepted until it or they shall have been inspected and approved by such officer or officers; and any of said articles not so approved shall be removed by the said party of the first part at its own expense, and within ten days after notification.

3. It is further covenanted and agreed, as aforesaid, that time is an essential element of this contract, and that, if the said party of the first part shall fail to make delivery of any or all of the articles or materials or to perform any or all of the services herein contracted for, in conformity with the conditions and requirements of the contract, and within the time or times prescribed, the said party of the second part will be damaged thereby; and the amount of said damages is hereby fixed and agreed to in advance, as liquidated damages and not as penalty, and the said party of the second [fol. 23] part shall make deductions from the contract price accordingly, as follows, viz:

For each day's delay, Sundays and holidays excepted, until satisfactory delivery or performance shall have been made, or until such time as the party of the second part may procure the same as hereinafter provided, at the rate of one-twentieth of 1 per cent of the contract price, the deductions, however, not to exceed in any case 10 per cent of the stipulated value of the articles or materials not so delivered, or of the services not so performed; rejection of deliveries or performance not to be considered as waiving deductions: Provided, That no liquidated damages shall be deducted for such period, after the expiration of the time or times prescribed for delivery or performace, as, in the judgment of the party of the second part, shall equal the time that, either in the beginning or in the prosecution of the deliveries or services contracted for, shall been have lost on account of any cause for which the United States is responsible, or on account of strikes, riots, fire, or other disaster, delays in transit or delivery on the part of transportation companies, or any other circumstances beyond the control of the contractor, but such circumstances shall not be deemed to include delays on the part of subcontractors in furnishing materials when such delays arise from causes other than those herein specified: And provided further, That the question whether delays are due to causes herein specified shall be determined by said party of the second part.

4. It is further covenanted and agreed that if the said party of the first part shall fail in any respect to perform the contract the same may, at the option of the United States, be declared null and void, without prejudice to the right of the United States to recover for defaults therein or violations thereof, or the said party of the second part may purchase or procure in such manner and from such person or persons as he deems proper, paying such prices therefor as may be necessary in order to procure the same, such of said articles or materials of the kind specified as near as practicable, or [fol. 24] procure the performance of such services, as the said party of the first part shall fail to deliver or perform as required, and may demand and recover from the said party of the first part the difference between the price so paid therefor and the price stipulated in the contract; and the amount of such difference shall be paid by the said party of the first part to the said party of the second part on demand.

5. It is further covenanted and agreed that the said party of the first part shall indemnify the United States and all persons acting under them, for all liability on account of any patent rights granted by the United States that may be affected by the adoption or use of the articles herein contracted for.

6. It is further covenanted and agreed that in carrying out the provisions of the contract no person shall be employed who is undergoing sentence of imprisonment at hard labor which has been imposed by a court of the United States, or of any State, Territory, or municipality having criminal jurisdiction; that the contract is upon the express condition that no Member of or Delegate to Congress, nor any person belonging to or employed in the naval service is, or shall be, admitted to any share or part therein or to any benefit to arise therefrom except as a member of a corporation; and that any transfer of the contract, or of any interest therein, to any person or party by the said party of the first part shall annul the same, so far as the United States is concerned.

7. And this contract further witnesseth, That the United States, party of the second part, in consideration of the foregoing stipulations, do hereby covenant and agree, to and with the party of the first part, as follows, viz:

That upon the presentation of the customary bills, and the proper evidence of the delivery, inspection and acceptance of the said article, articles, or services, and within ten days after such evidence shall have been filed in the Bureau of Supplies and Accounts, there shall be paid to the said The Barrett Co., or to its order, by the Navy pay Officer at Washington, D. C., (Disbursing Officer), the sum of [fol. 25] — or the amounts found due under this contract: Provided, however, That no payments shall be made on any one of said classes until all the articles or services embraced in such class shall have been delivered or performed and accepted, except at the option of the party of the second part.

In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.
(See Note.)

Barrett Company. (L. S.) R. R. Perry, V. Pres. (L. S.) E. J. Steer, Secy. (L. S.) S. McGowan, Paymaster General U. S. Navy, Chief of the Bureau of Supplies and Accounts. (L. S.)

Signed and sealed in the presence of (Signed) A. G. Brooks, as to party of the first part; E. W. Smith, as to Paymaster General U. S. Navy.

NOTE.—Contracts and bonds signed by a firm must be duly signed in the firm name and by each member of the firm, each signature to be sealed with wax or wafer seal. Contracts signed by a corporation shall be signed with the corporate name, by an officer thereof or a duly authorized agent, and sealed with the corporate seal; evidence of authority for signature to be appended.
4-2488

Bond

Know all men by these presents, That we, The Barrett Co., as principals, and United States Fidelity & Guaranty Co., as sureties, of New York, are held and firmly bound, etc., unto the Secretary of the Navy in the penal sum of Two hundred seventy thousand dollars, to be paid to the Secretary of the Navy, or his successors; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

[fol. 26] Sealed with our seals and dated this 17 day of June, 1918.

Conditions

The conditions of the above bond are such, that if the said above-bounden The Barrett Co., their heirs, executors, or assigns, shall well and truly, and in a satisfactory manner, fulfill the contract hereto annexed, and deliver the articles or perform the services mentioned in the annexed schedule within the time specified, and to the satisfaction of the said Chief of the Bureau of Supplies and Accounts, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

The Barrett Company. (Seal.) R. R. Perry, V. Pres. (Seal.) E. J. Steer, Secretary. (Seal.) United States Fidelity & Guaranty Co. (Seal.) Alonzo Gore Oakley, Atty.-in-fact. (Seal.) C. D. Morse, Atty.-in-fact. (Seal.)

Signed and sealed in the presence of A. G. Brooks, Phillip Laffer

Exhibit "B" to Petition

Supplementary Agreement 38925

Supplementary Contract 38925 dated 1 December 1920. Bureau of Ordnance requisition 844, Appropriation Reserve Ord. Sup. 1917-18.

Whereas, original contract 38925 dated 3 September 1918 provided for the erection of a xylol plant from advances made by the Navy, such plant and equipment to be the property of the Navy Department, and

Whereas, such advances were made and the xylol plant required erected therewith and such plant was in operation in accordance with the terms of the original contract when the contract was cancelled in part, and

Whereas, an agreement has now been reached with the Barrett Company and approved by the Secretary of the Navy for the sale of the said plant and equipment to the said Barrett Company.

[fol. 27] Now, therefore, this supplementary contract is entered into, for the purpose of transferring to the Barrett Company all right and title and ownership to the said xylol plant and equipment on the following terms: Said Barrett Company will pay to the Navy Department on the date of this contract the sum of $15,806.66 of which amount $5,806.66 is payment for the special equipment hereafter named and the sum of $10,000 is a payment in cash on account of the purchase of the xylol plant. Payment for rental of plant at the end of 1918 made by the contractor to the Navy, namely $752.67 is to be deducted from the cash payment above provided for, leaving the amount due in cash under this contract $15,053.88.

It is further provided that the said Barrett Company will pay to the Navy Department the additional sum of $100,000 payment of the same to be made in five equal installments, the first payment to be due one year after the date of this contract and the succeeding payments to be due at intervals of one year thereafter, respectively, until five payments of $20,000 each have been made.

It is furth-r provided that this debt, shall be without interest until the respective due dates specified herein.

The special equipment referred to in this contract the transfer of which to the Barrett Company is herein provided for, consists of the following:

Boiler House Apparatus—other than boilers and stokers.
Filter plant apparatus and its installation.
Railroad tracks.
Plant and City Water.
Motors, etc.
Pipe and Fittings.

It is further provided that the Barrett Company will furnish in connection with this contract a surety bond in the sum of $100,000 to cover the faithful performance of the agreement herein made, and that the liability under this bond is to be decreased as the respective

payments under this contract are made in the amounts of such respective payments.

[fol. 28] It is hereby further provided that the ownership of the xylol plant and the special equipment above mentioned shall pass from the Navy Department to the Barrett Company upon the execution of this contract with bond satisfactory to the Navy Department and on making to the Navy the cash payment of $15,806.66 above provided for, and that the Navy Department guarantees to the said Barrett Company full right and title to said xylol plant and to said equipment.

It is further agreed that this supplementary contract does not prejudice the right of the contractor to secure payment of claims in settlement for the termination of the original contract No. 38925 by the Government.

It is further understood that the boilers with their equipment, not covered by this contract, of which the Navy owns a one-sixth interest and the Barrett Company five-sixths, are subject to sale by the Barrett Company when opportunity offers, if approved by the Board of Survey, Appraisal and Sale, of the Fourth Naval District: one sixth of the payment received therefor to be paid to the Navy.

The payments herein provided for are to be made in the form of certified checks payable to the Secretary of the Navy and forwarded to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

(Signed) The Barrett Company, by Thos. M. Reinhard, V. Pres. The United States, by C. J. Peoples, Acting Paymaster General, U. S. Navy.

Bond U. S. Fidelity & Guaranty Co. Dec. 1/20. $100,000.

[fol. 29] III. Defendant's Counterclaim and Answer—Filed November 24, 1922

Comes now the defendant, by the Attorney General, and, answering the amended petition filed in the above-entitled cause, respectfully shows unto the court:

I

Defendant admits the averments of Paragraphs I, II, III, and IV

II

Defendant admits the averments of Paragraph V, except the last sentence thereof, wherein it is alleged that the suspension and the failure of the Navy Department to deliver further solvent naphtha severally or together constituted a breach of the contract, which allegation defendant denies.

Further answering, defendant says that the contract dated June 17, 1918, contemplated the production of an ingredient essential in the manufacture of gunpowder or other high explosives then necessary for the successful prosecution of the war with Germany, and [fol. 30] that at the time of its execution said contract was subject to and impressed with all of the limitations and conditions contained in the act approved June 15, 1917 (chap. 29, 40 Stats. L. 182), and of the Executive order of August 21, 1917, made pursuant thereto, wherein the President, and through him the Secretary of the Navy, was authorized and empowered at any time to modify, suspend, or cancel any existing or future contract or order for the manufacture of materials necessary for the conduct of military operations.

III

Defendant has no knowledge or information sufficient to form a belief as to any of the allegations contained in Paragraph VI of the petition, and, therefore, denies the same.

IV

Defendant has no knowledge or information sufficient to form a belief as to any allegations contained in Paragraph VII of the petition, and, therefore, denies the same.

Further answering, and for a second defense, defendant says that the profits which claimant alleges it might have made if the contract had not been canceled and suspended by the Navy Department, as aforesaid, are wholly remote, conjectural, prospective, and anticipated, and the recovery of the same does not constitute a legal basis for an action against the United States under the contract hereinbefore mentioned.

V

[fol. 31] As to Paragraph VIII, subparagraph (a), of the petition, defendant denies that the claimant was requested or required by the Navy Department to expend any sum in excess of the sum of $253,321.12, estimated by claimant in advance and approved by the Chief of the Bureau of Ordnance, Navy Department, as the cost of erecting the plant.

Further answering, defendant alleges and shows unto the court that paragraph 1 of the contract provided as follows:

1. Plant: The Barrett Company shall construct at Frankford, Pennsylvania, for the Navy, a plant with sufficient distillation apparatus and the necessary accessories to enable it to fractionate sufficient special solvent naphtha to produce at least 225,000 gallons per month of xylol for the Navy Department, provided the Navy will advance to the Barrett Company a sum equal to the approved estimated cost of said plant.

With the exception of such parts of the said plant and equipment needed for the supply of electric power, steam, water, and

light as will not be distinctly separable from existing plant and equipment of The Barrett Company, the xylol plant to be constructed and equipped for the Navy as contemplated herein shall be an entirely separate unit to be erected as an annex to already existing distillation equipment belonging to The Barrett Company, and it shall be distinctly separated from any buildings of said company by an adequate party wall, through which the necessary openings [fol. 32] may be provided.

The estimated cost, to be submitted to the Navy for approval prior to the execution of the contract, shall consist of two parts:

(a) An itemized estimate to cover the cost of said separate unit plant and equipment.

(b) An itemized estimate to cover the cost of such parts of the said plant and equipment needed for the supply of electric power, steam, water, and light, as will not be distinctly separate from existing plant and equipment of The Barrett Company.

By paragraph 9 of the contract it was further provided that immediately upon the conclusion of the contract The Barrett Company guarantees that it will offer the Navy for the separate unit plant contemplated under paragraph (a) of section 1, being the separate unit plant and equipment, 25 per cent of its original approved estimated cost; and that at the same time it will also offer the Navy for the portion of the plant and equipment contemplated under paragraph (b) of said section 1, being the plant and equipment to be constructed for supplying electric power, steam, water, and light, 25 per cent of its original approved estimated cost.

After the execution of the contract hereinbefore mentioned claimant, notwithstanding it had previously planned the construction of definite types of structures, respectively, for the chemical producing and refining plant and for the boiler and filter plant, which [fol. 33] types after repeated preliminary tests had been made were deemed necessary, and notwithstanding it estimated the cost of such structures and the chemical apparatus to be installed therein at a total cost to the Navy Department of $253,321.12, later changed the type of the chemical producing and refining plant from steel, with curtain walls of brick, to concrete reinforced with steel, and increased the number of tanks from 21, having a capacity of 6,255 cubic feet (which was estimated by claimant in its original estimates to the Navy Department as all that would be needed) to 36 tanks having a capacity of 7,500 cubic feet, and also materially changed the type and general character of the boiler plant, all of which changes in types of structures and equipment and the consequent increases in cost thereof over the original estimated requirements were without the request, authorization, approval of or subsequent ratification by the Navy Department, but on the contrary were made and incurred solely at the behest and for the benefit of claimant. Defendant denies, therefore, that it is legally obligated, either under the contract hereinbefore mentioned or upon any contract which might be implied in fact or in law, to pay or reimburse the claim-

ant the sum of $91,346.46, or any further sum in excess of the $253,321.12, advanced by the Navy Department and paid to claimant in satisfaction of the predetermined limitations placed on the cost of constructing said plant and installing the equipment therein. [fol. 34] To subparagraph (b), Paragraph VIII, of the petition, defendant answering admits that plaintiff furnished a surety bond in the sum claimed, but alleges that in so doing claimant only complied with the legal requirements and the ordinary custom of business, and the cost of furnishing such bond was a part of the incidental overhead cost of conducting business with the United States; wherefore the defendant denies that it is obligated to reimburse or repay to claimant the amount of the premium paid by it for such bond.

To subparagraph (c), Paragraph VIII, of the petition, defendant answers and says that by paragraph 10 of the contract hereinbefore mentioned claimant obligated itself, without additional cost to the United States, to assume the cost of insurance against all fires and accident risk, including both life and property, in so far as insurance was obtainable in commercial companies; wherefore the defendant denies that it is bound to respond in damages in the sum of $3,990.85, or any part thereof, as a loss resulting from the cancellation and suspension of the contract hereinbefore mentioned.

To subparagraph (d), Paragraph VIII, of the petition, defendant answering admits that plaintiff carried on certain preliminary experimental work in order to secure the production of a meta-xylol of the quality or variety such as would be required by the Navy Department under the specifications; but defendant alleges that said experimental work, carried on long prior to the execution of the contract hereinbefore mentioned, was not requested or required by [fol. 35] the Navy Department, but on the contrary, was carried on voluntarily by the claimant in order that it might determine in advance if it could produce meta-xylol such as would be required by the Navy Department in the manufacture of gunpowder and other high explosives. Defendant therefore denies that it is obligated either under the express contract herein or under an implied contract to reimburse plaintiff for such preliminary experimental work in the sum of $3,653.85, or any part thereof.

To subparagraph (e), Paragraph VIII, of the petition, defendant admits that claimant was obliged to handle and unload special solvent naphtha and other Government materials, to remove waste material, and to put the plant in proper condition for due preservation, and that there is due and owing the claimant for such services the sum of $841.61.

Further answering, defendant denies that it owes the claimant the total sum of $105,341.54, or any sum other than the $841.61 herein admitted, on account of losses alleged to have been sustained, and denies that there was any breach of contract by the United States by reason of the suspension and cancellation thereof by the Navy Department as alleged.

VI

Answering the allegations of paragraph 9 of the petition, defendant says that the net profits which claimant could, would, or might have earned in the handling and sale of the by-products and residue were wholly remote, conjectural, prospective, and antici- [fol. 36] pated, and the recovery of the same does not constitute a legal basis for an action against the United States under the contract herein. Defendant, therefore, denies that it owes claimant the sum of $18,875.00, or any part thereof, on account of said profits.

VII

Answering paragraph 10 of the petition, defendant denies that claimant is entitled to the sum of $198,009.20, or any part thereof, as just compensation for the matters and things set forth.

VIII

Defendant admits the allegations of paragraphs 11 and 12 of the petition, but denies that any prior settlement of or offer to settle any particular items or demands is legally binding upon the United States in this action.

IX

Defendant admits the allegations of paragraph 13 of the petition, except the allegation that claimant is justly entitled to the amounts claimed therein, which defendant denies.

Counterclaim

X

Further answering, defendant shows unto the court that payment of the sum of $253,321.12, advanced by the Navy Department to claimant, was made in two installments, viz, $126,660.56 on August 27, 1918, and a like sum on September 23, 1918; that of the [fol. 37] total sum $192,547.80, was advanced to cover the approved estimated and predetermined cost of constructing the chemical producing and refining plant (designated as schedule or unit "a" in paragraph 1 of the contract), and $60,773.32 was advanced to cover the approved estimated and predetermined cost of constructing the boiler plant (designated as schedule or unit "b" in said paragraph 1). The estimates on which said advances were made were prepared in detail and contained limitations on the individual items and parts, with necessary allowances for insurance, watchmen, temporary structures, engineering, overhead, and a 10 per cent allowance for contingencies.

XI

The original plans and estimates submitted by claimant and approved by the Navy Department contemplated, among other things, the construction of a separate boiler plant, which was to be equipped with one 250-horsepower boiler for the purpose of generating and supplying steam to the chemical producing and refining plant nearby in the distillation of Navy xylol. Under a separate and distinct contract with the War Department, dated May 22, 1918, claimant agreed for the sum of $250,176.00 to construct a boiler plant and equip the same with boilers to generate and supply steam for the distillation of phenol for that department. Solely in their own interest and for their own benefit, claimant entered upon the construction of a combination or joint boiler plant [fol. 38] to generate and furnish steam in the distillation of xylol under the Navy Department contract and phenol under the War Department contract. At or shortly after the signing of the armistice and when the contracts were cancelled by the two departments, said joint boiler plant was but 50 per cent complete, notwithstanding which the War Department allowed claimant in the settlement the full agreed price of $250,176.00 (the estimated cost of a complete boiler plant), which amount was independent of and in addition to the $60,773.32 previously advanced by the Navy Department as the estimated cost of a complete boiler plant for the production of Navy xylol.

XII

Further answering, defendant alleges that the said joint boiler plant was located adjacent to and formed a part of a group of other buildings and structures owned and operated by claimant for the commercial production and sale of dye and other chemical products made by the fractional distillation of crude naphtha or coal tar, and said boiler plant and other structures were all constructed upon land owned or otherwise controlled by claimant; that after claimant suspended work and discontinued the distillation of xylol for the Navy Department (no phenol having been produced for the War Department up to the date of cancellation by that department on December 12, 1918) claimant exercised the options granted to it under the provisions of the Army and Navy contracts, [fol. 39] respectively, and purchased the said joint boiler plant for the sum of $116,806.66, the Navy Department's share in such purchase being $5,806.66, exclusive of boilers.

XIII

Further answering, defendant says that by reason of the facts herein alleged, the claimant has been paid by the Navy Department, by way of advancements for the estimated and approved cost of the boiler plant, the sum of $30,386.66 (being one-half of the total estimated and approved cost of said plant, only 50 per cent

of which was completed at the time of the cancellation, as aforesaid) in excess of the amount which in good conscience and by virtue of the provisions of the contract it was or should be entitled to receive.

Wherefore the defendant prays judgment against the claimant and in favor of the United States in the sum of $30,386.66, together with interest thereon at 6 per cent per annum from September 23, 1918, to date of judgment, less the sum of $841.61 admitted in Paragraph V of this answer (subparagraph c) to be due and owing claimant; that the petition be dismissed, and that claimant be charged with the cost of printing the record herein as provided by statute.

Robert H. Lovett, Assistant Attorney General. P. M. Cox, Attorney.

[fol. 40] IV. Plaintiff's Replication to Answer and Counterclaim—Filed March 21, 1923

Comes now the claimant, The Barrett Company, and replies to the allegations of fact made in the paper entitled "Defendants' Counterclaim and Answer to Plaintiff's Amended Petition," and respectfully shows:

I. In reply to paragraph II of said answer, claimant admits that the contract dated June 17, 1918, contemplated the production of an ingredient for the manufacture of explosives necessary for the then existing war. Claimant denies that said contract was subject to the provisions of the act of June 15, 1917, Ch. 29, 40 Stat. 182, and of the Executive Order of August 21, 1917, and denies that the President or Secretary of the Navy was authorized thereby to modify, supsend or cancel the contract aforesaid.

II. In answer to paragraph IV of said answer, claimant denies that the profits alleged in paragraph VII of claimant's petition are remote or conjectural but admits that they are prospective and anticipated and avers that they are proximate and reasonable and readily capable of definite proof.

III. In answer to paragraph V of defendants' answer, claimant admits in general the allegations thereof in regard to the existence [fol. 41] of the contract and the contents thereof but for more particular knowledge thereof refers to Exhibit A, to the amended petition herein. Claimant admits that the structures and special equipment for the production of xylol were not built according to the original plans and specifications upon which an approved estimated cost of $253,321.12 was made but that experiments for the production of xylol as required by this contract, experience in producing it, the requirements of the government otherwise at claimant's plant and further study of the conditions of production at claimant's plant showed that changes were necessary in the struc-

tures and equipment and such changes were made substantially to the extent set forth in said answer. Claimant admits that the Navy Department did not make any request or order for said changes but asserts that said changes were known to the officers of the Navy Department who represented the United States in connection with said contract, were explained to said officers and were approved by them. Claimant further asserts that the changes so made were intended to facilitate the production of xylol under said contract, did facilitate it to some degree and would have facilitated it much more, had the contract been carried out, and that they were made for the object of increased, efficient and safe production under said contract, whereby great benefit would have accrued to the United States.

Claimant insists upon its claim as made in paragraph VIII of its petition, that it is entitled to be paid the sum of $94,346.46 on account of the cost in excess of the approved estimated cost to which the claimant was put in making said changes as a part of the cost under said contract not reimbursed by payments heretofore made for xylol delivered.

[fol. 42] Claimant further answers said paragraph that the amounts claimed on account of surety bond, fire insurance and experimental work are all costs in the performance of this contract for which claimant would have been compensated had the contract been completed, but for which no compensation has been made except to the extent admitted in paragraph VIII of the amended petition.

IV. In answer to paragraph VI of said answer, claimant denies that the profits claimed in the handling and sale of by-products are remote and conjectural as alleged but admits that they are prospective and anticipated and avers that they are proximate and reasonable and readily capable of definite proof.

V. In answer to paragraph X forming a part of the counterclaim of defendants, claimant admits that the sum of $253,321.12 was the approved estimated cost of the plant, including both buildings and equipment, to be constructed by the claimant company under the provisions of its contract of June 17, 1918, appearing as Exhibit A to the amended petition, and that payments were made to claimant of the sum in two instalments substantially as stated in said counterclaim.

Claimant denies that any portion of these two sums was advanced to cover any particular part of this plant and avers not only that the contract provides for the advance of a sum equal to the approved estimated cost of said plant without discrimination of its various parts but also that the Navy Department, in fixing and approving such cost, fixed the same at the lump sum of $253,321.12, without discrimination in regard to its origin and without distribution thereof into parts. Claimant avers that this total was reached by an elaborate series of detailed estimates containing many items and [fol. 43] admits that the totals of the items of the chemical pro-

duc-ing and refining plant and of the boiler plant were in the amounts severally stated in said paragraph X.

VI. In answer to paragraph XI of said counterclaim, claimant admits that the original plans and estimates submitted by claimant and approved by the Navy Department contemplated the construction of a separate boiler plant under this contract to supply one 250,000 h. p. boiler.

Claimant admits that a contract was made between the United States and claimant based on a procurement order dated May 22, 1918, and bearing the same date, though not signed until later, for the manufacture of 24,000,000 pounds of phenol for the Chief of Ordnance, United States Army, under the authority of the Secretary of War. This contained, among other things, the following provision:

"Article III. Additional Plant Facilities to be Furnished by Contractor.—The Contractor shall, at its own expense, construct and provide such additional facilities in connection with the said plant and with its existing plant, including steam plant and steam lines, water supply, boiler space, boiler room, increased storage facilities, workmen's wash and locker rooms, and railroad siding. Plans and specifications for such additional facilities shall be submitted for approval to the Chief of Ordnance, together with the plans and specifications for the plant, and upon the approval thereof the Contractor shall forthwith proceed with the construction of such additional facilities at its own cost. It is estimated that the cost of construction and installation of the facilities referred to in his Article will be approximately $250,176. The Contractor shall keep complete record of all expenditures therefor, and shall, upon completion of such facilities, file a verified statement of such expenditures with the Chief of Ordnance. No payment shall be made to the Contractor [fol. 44] with respect to said increased facilities, except such as is hereinafter provided in the event of termination of this contract prior to the delivery of the phenol herein contracted for."

The provision last referred to in regard to payment with respect to said increased facilities is contained in Article XVI as follows:

"In the event of the termination of this Contract as in this article provided, the United States shall also reimburse the Contractor to the extent hereinbelow stated for the cost of the additional facilities referred to in Article III:

"If terminated prior to January 1, 1919, the total cost thereof, but not in excess of $250,176."

Said contract was terminated prior to January 1, 1919, when no deliveries of phenol had been made thereunder.

Claimant avers that, after the signature of the contract of June 17, 1918, here in suit, conferences were held between the authorized representatives of the Navy Department and of the War Department and representatives of the claimant and it was agreed between them that for the better execution of the two contracts aforesaid a joint

boiler plant should be erected to generate and furnish steam under both of said contracts and that said boiler plant should be considered and charged as five-sixths for the benefit of the War Department contract and one-sixth for the benefit of the Navy Department contract.

Claimant denies that the arrangement was solely in the interest and for the benefit of claimant, and avers that it was for the benefit of the United States so that production might be increased and made more prompt and efficient and safer.

[fol. 45] Claimant admits that after the signing of the armistice and when said contracts were suspended, said joint boiler plant was not complete and avers that it was more than fifty per cent complete. Claimant further avers that its expenditures on account of the additional facilities provided for in Article III above quoted from the contract with the Chief of Ordnance, United States Army, were at the date of termination of said contract in excess of $250,176. Claimant admits the allowance by the War Department in accordance with Article XVI of the contract of $250,176 for expenditures made by claimant in accordance with Article III of said contract and the payment thereof, subject to the deduction of the appraised value in accordance with Article XVI of said contract as above quoted. Claimant also avers that the United States and claimant entered into an agreement of settlement of all matters arising out of or connected with said original contract, by a settlement contract dated April 2, 1920. Claimant calls upon defendants for the production of said original contract bearing date May 22, 1918, and of the settlement contract aforesaid dated April 1, 1920.

VII. In answer to paragraph XII of said counterclaim, claimant admits the location and construction of the joint boiler plant as stated in said paragraph and that no phenol had been produced for the War Department up to the date of cancellation of the contract therefor by that Department on December 12, 1918.

Claimant admits that by the contract of December 1, 1920, between claimant and the United States, claimant purchased the boiler house, apparatus and other equipment, as more fully set forth in said contract, for the sum of $5,806.66, exclusive of the boilers, as fully appears in Exhibit B to claimant's amended petition. Claim-

[fol. 46] ant also admits that by another contract, made on the 29th day of May, 1920, which claimant calls upon the defendants to produce, claimant purchased the interest of the United States in said portion of said boiler plant which was recognized as furnished under the War Department contract.

In further answer to said counterclaim, claimant avers that said agreement of December 1, 1920, was a complete settlement of the rights of the parties in relation to said buildings and equipment, except as it was agreed therein that it did not prejudice the right of the contractor to secure payment of claims in settlement for the termination of the original contract by the government.

VIII. In answer to paragraph XIII of said counterclaim, claimant denies that it has received from the Navy Department the sum of

$30,386.66 or any other sum in excess of the amount which in good conscience and by virtue of the provisions of the contract herein sued upon it was entitled to receive and avers that, on the contrary, there is due and payable by the United States, as set forth in paragraph XIII of the amended petition, the sum of $198,009.20, after allowing all just credits and offsets.

IX. Claimant denies all other matters alleged in said answer and counterclaim of defendants not herein admitted or specially denied and prays that strict proof thereof be required of defendants.

R. V. Mahon, Secretary. King & King, Attorneys for Claimant

[fol. 47] Sworn to by R. V. Mahon. Jurat omitted in printing.

[fol. 48] V. Argument and Submission

On December 4, 1924, this case was argued and submitted on merits by Mr. William B. King for plaintiff and Messrs. Dan Jackson and P. M. Cox for defendant.

[fol. 49] VI. Minute Entries

On February 16, 1925, the court filed findings of fact and conclusion of law, and entered judgment in favor of the plaintiff in the sum of $10,995.08, with an opinion by Booth, J.

On March 5, 1925, the plaintiff filed a motion for a new trial.

VII. Orders Amending Findings and Overruling Motion for New Trial—May 4, 1925

It is ordered by the Court this 4th day of May, 1925, that the last paragraph of Finding III of the findings of fact heretofore filed be and the same is amended so as to read as follows:

"The increased cost of construction was due to increases in the cost of labor and materials, and a change in construction from steel and brick to reinforced concrete and brick due to inability to secure steel, and to certain changes in the tanks as originally proposed in order to increase their capacity. None of these changes were either directed, authorized, or approved by the Navy Department, but it does appear that the department had knowledge of the changes and and made no objection thereto."

The findings as thus amended, and the judgment and opinion to stand.

It is further ordered that the plaintiff's motion for new trial be and the same is overruled.

[fol. 50] **VIII. Findings of Fact (as Amended May 4, 1925), Conclusion of Law, and Opinion of the Court**—Entered February 16, 1925

This case having been heard by the Court of Claims upon the evidence, the court makes the following

FINDINGS OF FACT

I

The plaintiff is a corporation duly incorporated under the laws of the State of New Jersey, with its principal business office in the city of New York, State of New York.

II

On June 17, 1918, plaintiff entered into a contract with the Paymaster General of the Navy, representing the Secretary of the Navy, to construct a plant at Frankford, Pa., for the Navy, with a capacity sufficient to produce at least 225,000 gallons per month of xylol from distillation of special solvent naphtha furnished by the Navy, provided the Navy would advance to plaintiff a sum equal to the approved estimated cost of said plant, the said plant to be an annex to the existing distillation plant and equipment of plaintiff, and to be an entirely separate unit, except as to such parts of the equipment for supplying electric power, steam, water, and light as will not be distinctly separable from the existing plant and equipment of plaintiff. The estimated cost was to be submitted to the Navy for approval prior to the execution of the contract, and was to consist of two parts: (a) "An itemized estimate to cover the cost of said separate unit plant and equipment, (b) an itemized estimate to cover the cost of such parts of the said plant and equipment needed for the supply of electric power, steam, water, and light as will not be distinctly separate from existing plant and equipment of the Barrett Co.," one-half of the sum to be advanced to be paid at the time of the execution of the contract and the balance two months thereafter. The said plant and equipment to be ready for operation within five months from the date of the contract, and to be continued in operation until it shall have delivered 2,700,000 gallons of xylol to E. I. du Pont de Nemours & Co.

A copy of the original contract, attached to the petition as Exhibit A, except subparagraph 5 of paragraph 16 relating to indem-[fol. 51] nity for use of patented inventions, which was stricken out before its execution, is made part of this finding by reference thereto.

The xylol provided for in the contract was to be employed in the manufacture of trinitroxylol for use in mine barrage in the North Sea and was a new product requiring knowledge and skill in its manufacture.

The plaintiff, as required by the contract, submitted prior to its execution itemized estimates of the cost of the plant provided for

therein. The estimate of cost of the separate unit and equipment (a) was $192,547.50, and the estimated cost of the part of the plant needed for the supply of electric power, steam, water, and light to said unit, which could not be separated from the existing plant and equipment of plaintiff (b) was $60,773.32, a total of $253,321.12. The itemized estimates of the cost of said plant, $253,321.12, included and provided for the cost of overhead expenses and liability insurance.

The estimates of the plaintiff were approved by the Navy Department and one-half of the estimated cost of the plant, $126,660.56, was advanced to plaintiff on the execution of the contract and the remainder, as provided by paragraph 6 of the contract, two months thereafter.

III

On May 18, 1918, the Navy Department mailed the following notice to plaintiff: "The offer of the Barrett Co. for the construction and operation of a plant for the production of metaxylol from special solvent naphtha is in general satisfactory to the Navy. Formal contract is in course of preparation containing such modifications of detail in the company's offer as may be mutually acceptable to the interests concerned. Pending the receipt of this contract the company is authorized and directed to proceed immediately upon the construction of the plant referred to."

Upon receipt of the above notice the plaintiff immediately proceeded to secure material for the construction of said plant, and the separate unit for the distillation of naphtha described as Schedule A was completed about September 19, 1918, at a cost of $284,882.66, and the electric, steam, water, and light plant was about 50 per cent completed at a cost of $52,897.53, a total of $337,780.19, or a cost of $84,459.07 more than the estimates submitted by plaintiff. The cost of engineering and overhead included in the estimate of $253,321.12 was $17,229.40.

"The increased cost of construction was due to increases in the cost of labor and materials, and a change in construction from steel and brick to reinforced concrete and brick due to inability to secure steel, and to certain changes in the tanks as originally proposed in order to increase their capacity. None of these changes were either directed, authorized, or approved by the Navy Department, but it does appear that the department had knowledge of the changes and made no objection thereto."

IV

The plaintiff began the production of xylol on September 19, 1918, and from that date to November 19, 1918, produced and delivered, in accordance with the terms of said contract, 191,330 gallons.

[fol. 52] While work was in progress the Paymaster General of the Navy mailed a letter, dated November 18, 1918, to plaintiff which reads:

"Subject: Discontinuance of work under contract 38925.
"Reference: Telephone conversation with Mr. J. W. Jayne November 16, 1918.

"SIRS: Confirming the telephone conversation referred to above, the Navy directs that the manufacture of xylol under contract 38925 be discontinued as soon as the distillation of material in the stills of the Navy plant at the time of the telephone conversation referred to has been completed. It is further directed that the company do not maintain readiness in any way to continue work under the said contract, and that no further unnecessary expense be incurred for the account of the Navy.

Any unnecessary construction work remaining to be completed under the terms of contract 38925 will not be undertaken, and the fact that the Navy will receive a partly finished plant shall be considered in the final adjustment to be made with regard to the contract. The company is to use its best judgment in determining to what extent construction work is to be stopped, and if in doubt will consult the cost inspector at 17 Battery Place.

From finished xylol now on hand at Frankford, Pa., and belonging to the Navy, the Barrett Co. is authorized to supply the immediate demands of commercial users. The disposal of such xylol to commercial firms shall be handled under the same terms as the disposal of Navy by-products under contract 38925, except that wherever possible Navy tank cars will be used in making shipments as long as such tank cars are available. As in the case of the disposal of by-products, the disposal of xylol to commercial firms shall be handled in conjunction with and subject to the approval of the cost inspector. No preference whatever, as between commercial users making application for such material, shall be shown, and all shall be treated alike.

It is requested that the Barrett Co. forward the Navy as soon as convenient suggestions for adjustment of the said contract, to be considered in the event of future cancellations."

Thereafter the Government failed to furnish any further supplies of special solvent naphtha for distillation into xylol by plaintiff, and as a result of such failure work under said contract was terminated.

All the power conferred on the President by the act of March 4, 1917, 39 Stat. 1193, and by the section entitled "Emergency shipping fund" in the act of June 15, 1917, 40 Stat. 182, was delegated by him by Executive order of August 21, 1917, emergency legislation, page 176, to the Secretary of the Navy, "in so far as applicable to and in furtherance of the construction of vessels for the use of the Navy and of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for construction of vessels for the Navy and of war materials, equipment, and munitions required for the use of the Navy, and the more economical and expeditious delivery thereof. [fol. 53] The powers herein delegated to the Secretary of the Navy

may, in his discretion, be exercised directly by him, or through any other officer or officers who, acting under his direction, have authority to make contracts on behalf of the Government."

V

From the xylol produced and delivered as required by the terms of the contract in September, October, and November, 1918, the Government paid plaintiff profits aggregating $7,195.59. The evidence shows that by-products of xylol were produced and sold by plaintiff. It fails to disclose the amount or the receipts therefrom.

VI

By paragraph 16 of said contract the plaintiff was required to, and did, furnish a surety bond in the penal sum of $270,000 at a cost of $2,700, conditioned on the faithful performance of its contract, and was reimbursed therefor in the sum of $191.23 of the payments aforesaid, leaving the sum of $2,508.67 not reimbursed.

VII

The contract provided (paragraph 10): "Fires and accidents: It is understood that the Barrett Co. now anticipates no difficulty in securing complete insurance, and that it will use its best endeavors to secure and will assume the cost of insurance against all fires and accident risks, including both life and property, in so far as insurance is obtainable in commercial companies. Should it be impossible to obtain complete protection by such insurance, it is understood that the Barrett Co. will reduce accordingly the price to be paid for xylol by the Navy." In compliance with the above provision of the contract, the plaintiff took out fire and other insurance for the protection of said plant, and paid premiums thereon in the sum of $9,810.26, of which $733.15 was the cost of premiums from October 1 to November 19, 1918. Plaintiff was reimbursed therefor in the sum of $695.18 for the payments aforesaid, leaving a balance of $9,115.08. After the termination of the contract, the sum of $5,124.13 was returned to plaintiff by insurance companies, leaving a balance of $3,990.95.

The plaintiff in its itemized estimates for the construction of the plant, approved by the Navy and paid to plaintiff in the sum of $253,321.12, included items of liability insurance amounting to $2,211.54.

VIII

From June 1, 1918, until the termination of said contract the plaintiff carried on certain experimental and research work in order to secure the production of the quality of xylol required by the Navy under said contract, said work costing $3,932.60. Plaintiff was reimbursed therefor in the sum of $278.75 by the payments aforesaid, leaving the sum of $3,653.85 not reimbursed.

[fol. 54] IX

After the termination of said contract plaintiff was obliged to handle and unload special solvent naphtha and other Government materials, to remove waste material, and to put the plant in proper condition for due preservation at a cost of $905.82. It was reimbursed therefor in the sum of $64.21 on the payments aforesaid leaving the sum of $841.61 not reimbursed.

X

From books and papers turned over by plaintiff to several public accountants certain results have been obtained, one that if the plaintiff had been allowed to complete the contract, and to have produced and delivered 2,700,000 gallons of xylol, instead of 191,330 gallons it would have realized on the unproduced part, 2,508,670 gallons, a profit of $73,792.66. These calculations were made from about seven (7) per centum of the records of production of the whole contract if it had been performed, and the result thus obtained as to the ninety-three (93) per cent unperformed was problematical and uncertain.

XI

The contract provided in paragraph 2, among other things, that "all by-products and residues obtained from said special solvent naphtha, excepting such as the Navy may wish to retain, shall become the property of the Barrett Co. as a part of its profit; Provided, however, that (1) The said company shall not use said by-products and residues otherwise than for disposal to third parties without the written consent of the Navy. (2) There shall be credited to the account of the Navy, within 60 days after the time of such disposal to third parties, 90 per cent of the disposal value of all such by-products and residues as become the property of the Barrett Co. in accordance with the provisions of this clause, less a charge of 1 cent per gallon for rental of containers used for shipment. (3) The Navy shall give the Barrett Co. at least 90 days' notice in writing of its intention to retain possession of any such by-products and residues."

From books and papers furnished them by plaintiff, the same public accountants who made the computations for Finding X, estimated the net profits to plaintiff from by-products from the uncompleted portion of the contract—the distillation of 2,508,670 gallons of special solvent naphtha—at $8,237.20. These estimates were based on the estimated sales of all by-products under the entire contract, less actual sales. The amount of actual sales is not stated.

XII

On March 26, 1919, the plaintiff presented the following claim to the Navy Department:

[fol. 53] Claim on Account of Navy Contract No. 38925

	Contract allowance	Expended
Schedule A	$192,547.80	$285,711.82
Schedule B	60,773.32	52,348.15
	253,321.12	338,059.97
		253,321.12
A. Overexpended		84,738.85
B. Unapportioned overheads during construction		7,500.00
C. Premium on bond	$2,700.00	
Less credit earned (191,330 × .011)	191.33	
		2,508.67
D. Release from 25% payment clause with credit of earned amount (2½¢ × 191,330 gals.)		4,783.25
E. Insurance for operating period	$4,686.13	
Less credit earned (191,330 × .0036334)	695.18	
		3,990.05
F. Unloading cars and handling material, and maintenance of plant after suspension		575.00
G. Compensation for use of organization and knowledge in design of plant, experimental work done, and services of administrative officers not included in plant overheads		15,000.00
		*109,529.32

By direction of the Paymaster General of the Navy the following letter, dated May 9, 1919, was mailed to and received by plaintiff:

"Subject: Contract 38925, regarding company's claim by reason of cancellation.

"Reference: (a) Your letter March 26, 1919; (b) your letter April 24, 1919; (c) your letter May 3, 1919.

"SIRS: Careful consideration has been given to the claim of your company as submitted to this office with your letter reference (a) and it is noted, as per reference (c), in connection with the settlement of this contract that you definitely refuse to make the Navy any offer for the plant.

"It is believed proper to allow the following items:

Item C	$2,508.67
Item D	4,783.25
Item E	3,990.05
Item F	575.00

*Correct amount $119,095.82.

"With respect to item (A), however, in the sum of $84,738.85, this sum can not be allowed, as it is not believed the same or any part thereof is properly chargeable to the Navy.

"From the record the facts show that the plant was to be constructed by the Barrett Co. for an amount which should represent estimates made by the Barrett Co. and approved by the Navy. The arrangement was covered by the contract, which stated the approved estimate to be in the sum of $253,321.12, which sum was thereupon immediately advanced by the Navy to the Barrett Co. This sum represented the amount for which the Barrett Co. was obligated to build the xylol plant. The very scheme of the arrangement was such that the Navy was not concerned with whether the plant cost more or less to construct than the approved estimated price paid, so [fol. 56] long as the requirements agreed upon as items of the estimate were included in the construction and equipment work. The parties dealt at arms length and the bargain was closed with respect to the plant at the figure named, the chances being assumed by both the Navy and the Barrett Co. as to which of the parties got the better end of the bargain, which no one could determine definitely until all work was entirely completed.

The Barrett Co. contends that one of the specific causes for the increased work in due to the fact that the company was compelled to use reinforced concrete rather than steel and that, also, the tanks which were mentioned in the cost estimates, were required to be changed in order to handle the production work contemplated. However this may be, it seems that the agreement was definite to build a certain xylol plant and the difficulties of construction or errors in judgment are in no way attributable to the Navy, and, in fact, by the very nature of the agreement was a matter in which the worry and concern over difficulties in this regard was up to the company.

"Item (B) which represents unappropriated overheads during the construction is not allowable for the same reasons as assigned to item (A).

"With respect to item (G), which is not allowed, it would seem that the use of the company's organization, knowledge, experimental work, and services in designing the plant, etc., was in the contemplation of the parties at the time the question of building the plant on certain approved estimates was being considered and that these items were properly included in such estimates.

"In answer to the company's contention that the Navy received all of the benefits form the services included under this item (G), it is to be remembered that the company must have received benefits in the way of development, experiment, and also some actual monetary returns on the xylol produced prior to the discontinuance of the work and accepted under the contract.

"The Navy feels, from a fair interpretation of the contract between itself and the Barrett Co., the question of plant construction and installation of equipment was and is a matter separable from the question of deliveries of xylol and the Navy's discontinuance of the acceptance of such deliveries. With this view in mind, it

is not believed proper to make allowance for any items as contained in the company's claim other than those stipulated in the second paragraph of this letter.

"Following this line of thought and in view of the fact that the company definitely refuses to make the agreed offer for the plant, the Navy is unable to comply with the company's request to be released from the clause in the contract whereby the Barrett Co. guarantees to offer to the Navy a sum equal to 25 per cent of the estimated cost of the plant; and for this reason the sum of $4,783.25, item (D), which the company credited to the Navy in its statement of claim, is allowed as a credit to the company."

[fol. 57] The following letter, signed by the Paymaster General of the Navy, dated March 11, 1920, was mailed to and received by the plaintiff:

"Subject: Contract 38925—Barrett Co.'s claim and disposition of Navy owned property.

"Reference: (a) Claim of the Barrett Co. under date of March 26, 1919; (b) company's letter of January 10, 1920; (c) supplies and accounts' letter, 115-19, 38925, January 14, 1920.

"SIRS: Report of tentative appraisal and final cost examination in connection with construction and production under contract 38925 has been received by the Bureau of Supplies and Accounts. The report of the board of appraisal shows the work of construction originally contemplated under Schedule A, to have been completed, while that under Schedule B has been approximately 50 per cent completed. In accordance with this report there is due the Navy a refund of 50 per cent of the advance made to the company on account of Schedule B.

"While the report of the cost inspector substantiates the cost reported by the company, no evidence is found to support the company's claim for reimbursement of costs in excess of the original estimate upon which the Navy advance was based. In fact the record of profit from production rather supports the view that the company was fully cognizant of the probable profit for the entire contract and increased the specifications on its own initiative and responsibility accordingly. The claim for this excess is therefore disallowed.

"The items (b) and (g), 'undistributed overhead,' are not allowed, the estimates upon which the Navy advance was based and the final cost determined being inclusive of all overhead and direct cost.

"Item (c), 'Premium on bond,' is disallowed, the Comptroller of the Treasury, in decision of October 11, 1918, having held such reimbursement to contractors illegal.

"Item (d) is properly due the Navy for amortization to be covered by final disposition of the plant.

"Items (e) and (f), 'Insurance and handling charges,' have been allowed as a charge to the Navy.

"The proposal submitted by the company for the purchase of the Navy share of Schedule A, at approximately $84,000, is rejected

pending further proposal in regard to Schedule B and final settlement.

"The board of survey, appraisal and sale for the fourth naval district at Philadelphia, Pa., has been requested to communicate with the company in regard to the final settlement and is authorized to receive such proposal as may be submitted. It is requested that correspondence on this subject be directed to that board."

XIII

Paragraph 9 of the contract provided:

"The entire plant and equipment contemplated herein shall be the property of the Navy Department.

"Immediately upon the conclusion of this contract the Barrett Co. guarantees that it will offer the Navy for the separate unit plant con- [fol. 58] templated under paragraph (a) of Section 1 above, 25 per cent of its original approved estimated cost; and that at the same time it will also offer the Navy for the portion of the plant and equipment contemplated under paragraph (b) of said Section 1 25 per cent of its original approved estimated cost. Whether or not the Navy accepts either one or both of said offers, it is understood and agreed that the Navy shall have the right to rent for Government use only, on a fair and just basis such real estate and plant equipment, together with such rights of ways and user rights, as will be necessary for the proper operation of said plant for the production of xylol or the removal of said plant from the premises of the Barrett Co., if its ownership is retained by the Navy and operation is not intended."

A supplemental contract was entered into between the plaintiff and the Acting Paymaster General on December 1, 1920, for the purchase of said plant for the sum of $115,806.66, but the price afterwards agreed upon and paid was $110,000. The equipment for distilling, which was almost new at the date of sale, was similar in general respects to those used in a number of plants in the country for distillation of coal-tar products. The plaintiff was engaged in distillation of coal-tar products at least as late as July 7, 1922. In 1921 the purchased plant was used by plaintiff for experimental purposes.

The supplemental contract, dated December 1, 1920, is attached to the original petition as Exhibit B and is made part of this finding by reference thereto.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $10,995.08 under Findings VI, VII, VIII, and IX.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of ten thousand nine hundred and ninety-five dollars and eight cents ($10,995.08).

Opinion

Booth, Judge, delivered the opinion of the court.

The Navy Department during the war needed and sought to obtain large quantities of xylol. The source of supply was limited, and while the process of extracting xylol from naphtha was not in all respects perfected, it had been successfully done and xylol sold on the market. The Barrett Co., the plaintiff herein, was engaged in this identical business, but was not in a position to meet the demands of the department because of limited facilities and much curtailed output. The department wanted at least 225,000 gallons of xyloi a month. To this end negotiations were entered upon between the plaintiff and defendant, culminating on June 17, 1918 in a contract, by the terms of which the plaintiff was to enlarge its existing plant and construct a new one sufficient in size and equipment to distill the desired quantities of xylol from naphtha, the naphtha to be furnished by the defendant. The plaintiff was to estimate the cost of such a plant and necessary equipment, and upon the approval [fol. 59] of such an estimate the defendant agreed to advance to the plaintiff one-half the amount of the estimated cost at the time of the execution of the contract and the balance in two months thereafer. The entire construction work was to be completed and ready to distill xylol within five (5) months from the date of the agreement. The plant, as provided by the contract, in view of the payment of cost by the Government, was to become the property of the Government subject to its user and control for governmental purposes. The plaintiff agreed to offer 25 per centum of its original estimated cost for the plant when the contract expired, an offer the defendant had an option to accept or reject. The plaintiff submitted its estimated cost of plant, viz, (a) $192,547.50 as cost of the separate unit of construction and equipment, and (b) $60,773.32 as cost of the part of the plant necessary for the supply of electric power, steam, water, and light. This last item of cost was made necessary because of the additions to the existing plant in the above regard, and which obviously could not be definitely segregated from its then light, steam, etc., plant at the time in operation and sufficient in size and capacity to meet the plaintiff's normal requirements. The above estimates, totaling $253,321.12, were approved. The money was paid in accord with the contract. It was accepted by the plaintiff and the construction program was proceeded with. The plaintiff incurred an additional expense of $84,459.53 in the course of the construction. The separate unit, i. e., the building and equipment, was completed about the middle of September, 1918, at a cost of $284,882.65. The electric, steam, light, and water plant was near to half completion, at a cost of $52,897.63, when suspension orders were received.

The first item in suit is for the recovery of this additional expenditure. It is conceded that the case and the result is determined by the case of Russell Motor Car Co. v. United States, 261 U. S. 514. The judgment to be awarded must come within the rule as to just compensation. The right conferred upon the defendant by the act of June 15, 1917, 40 Stat. 182, was the specific power and authority

to "modify, suspend, cancel or requisition" any existing contract. The contract herein was terminated November 18, 1918. However, by this act we do not understand that the granted authority to terminate in any particular varied the plain provisions of the existing contract. It is true the plaintiff, because of emergency conditions, determined to go beyond its express warrant of authority and incur added expense in the construction of the desired plant, but the contract itself contemplated no such increased expense, and there were manifestly no contractual obligations imposed upon the plaintiff to do what it did do. But, says the plaintiff, except for the exercise of the right of termination, the additional expense of construction would have been amortized in the total profits received upon completion, and therefore becomes a sum indispensably necessary to make the plaintiff whole. Apparently a sufficient answer is the assumption of such risk by the plaintiff. The right to terminate under the statute was part of the contract, and an unauthorized expense incurred depended for reimbursement upon the contingency of its exercise. What the plaintiff did, over and above the limitations of its contractual obligations and rights, it did of its own free will and assumed the hazards of recouping the same out of its final profits, in the event the contract proceeded to conclusion.

[fol. 60] It is not asserted that the contract supports the plaintiff's contention. The contention is predicated entirely upon the theory of just compensation. We have been unable to resolve the issue in plaintiff's favor. The just compensation to which the plaintiff is entitled, under the cases heretofore considered by the court, is limited to the stipulations of the contract, which by its terms imposed obligations and reciprocal rights and privileges upon the parties to the contract. Meyer Scale & Hardware Co. v. United States 57 C. Cls. 26; College Point Boat Corporation v. United States, 58 C. Cls., 380; affirmed by Supreme Court January 19, 1925. The contract fixed the status of the parties thereunder. If one goes beyond its terms it is difficult to perceive how financial obligations to pay more than is agreed to be paid can be inferred on the single theory that the defendant in the exercise of a lawful right terminated all further proceedings under the same and is held thereafter to account for no more than just compensation. In view of the cases cited the just compensation to be awarded must be a loss lawfully resulting from a performance of the contract according to its terms, and may not embrace one occasioned by the contractor's departure from the contract, although considered by the contractor at the time as expedient and in promotion of the rapid completion of the whole contract. As a matter of fact, the plaintiff purchased the plant and equipment, paying therefor $110,000. The supplemental contract so states. No claim was made, so far as the record discloses, for this item of expense at the time of the sale, and if allowed, this item would enable the plaintiff to obtain a modern distillation plant for $25,540.93 which admittedly cost the Government $253,321.12. The record exhibits the unusual state of affairs, wherein a contractor in the course of adjustment of losses due to a termination of its contract, purchases a plant from the Government, paying therefor a very substantial

sum, concluding the transaction without claim for a reduction of purchase price on account of increased expenditures. In many respects this transaction alone would be sufficient to preclude the recovery claimed for this item of loss. It was a final adjustment of losses with respect to this particular controversy. The plaintiff acquired the plant and paid the agreed purchase price, and in all ways conformed to the articles of agreement.

Finding X reflects the record on the subject of anticipated profits. The plaintiffs insist upon a judgment of sufficient proportions to cover anticipated profits. The contract provided (par. 7) that it should continue in full force and effect until 2,700,000 gallons of xylol shall have been delivered to E. I. du Pont de Nemours & Co. The contention is advanced that this is an unusual provision in an unusual contract, and is the equivalent of a guarantee that the contract shall survive until the full amount of xylol is delivered, and that granting the unquestioned right of cancellation under the statute, nevertheless this positive assurance as to time limit in the contract creates equities in favor of the plaintiff which may not be ignored in ascertaining just compensation. In other words, the measure of just compensation under the peculiar state of affairs is to include anticipated profits. The Supreme Court in the case of Russell Motor Car Co., supra, expressly determined adversely to plaintiff's contention. We are unable to differentiate the rule there announced from the rule applicable to the record in this case. To concede to plaintiff the [fol. 61] contention made with respect to this item would be giving to the authorized act of cancellation the legal effect of a breach of the contract by defendant and all its attendant consequences. It would, in effect, take from the statute all it was designed to accomplish, and virtually entail upon the court the necessity of eliminating it from the contract. Quoting from the opinion of the Supreme Court relating to a contention identical with the one now advanced, the following was said: "It is contended further that even if the action of the Secretary of the Navy was warranted by the statute the car company was nevertheless entitled to have included as just compensation its anticipated profits. This contention confuses the measure of damages for breach of contract with the rule of just compensation for the lawful taking of property by the power of eminent domain. In fixing just compensation the court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the car company if it had been fully performed." Russell Motor Car Co. v. United States, supra. With this established rule before us, we think the contention is devoid of merit.

The plaintiff is entitled to a judgment under Findings VI, VII, VIII, and IX for $10,995.08. The defendant seemingly concedes the allowance of the above items. In any event, we believe they come within the cases decided by the Supreme Court, and to this amount the plaintiff is justly entitled.

Judgment is awarded the plaintiff for $10,995.08. It is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Campbell, Chief Justice, concur.

[fol. 62] IX. JUDGMENT

At a Court of Claims held in the City of Washington on the sixteenth day of February, 1925, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of Ten thousand nine hundred and ninety-five dollars and eight cents ($10,995.08).

By the Court.

[fol. 63] IX. PETITION FOR AND ORDER ALLOWING APPEAL—Filed May 4, 1925

From the judgment entered in the above entitled cause on the 4th day of May, 1925, the claimant, The Barrett Company, hereby makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

King & King, Attorneys for Claimant.

It is ordered by the Court this 5th day of May, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 64] IN COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the argument and submission of the case, of the findings of fact, conclusion of law and opinion of the court, of the final judgment of the court, of the plaintiff's application for an appeal and of the order of the court allowing said appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 7th day of May, A. D. 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 31,160. Court of Claims. Term No. 450. The Barrett Company, appellant, vs. The United States. Filed May 11th, 1925. File No. 31,160.

Supreme Court of the United States.

October Term, 1926.

No. 105.

THE BARRETT COMPANY, *Appellant*,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.
Reported 60 C. Cls. 343.

BRIEF FOR APPELLANT.

GEORGE A. KING,
FRANCIS H. McADOO,
WILLIAM B. KING,
Attorneys for Appellant.

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LIST OF CASES CITED.

OTHER AUTHORITIES.

Supreme Court of the United States

October Term, 1926.

THE BARRETT COMPANY, *Appellant*,
v.
THE UNITED STATES. } No. 105.

APPEAL FROM THE COURT OF CLAIMS.
Reported 60 C. Cls. 343.

BRIEF FOR APPELLANT.

Jurisdiction of this Court.

1. The judgment to be reviewed was first rendered February 16, 1925 (rec. top p. 42). It was reentered May 4, 1925 (p. 29), with an amendment to Finding III, stated in the judgment (foot p. 29), as well as embodied in the text of the finding (p. 31, last paragraph of Finding III). The judgment awarded certain items of claim hereinafter (*post*, p. 7) specifically referred to, amounting to $10,995.08, but disallowed an item of $84,459.53 (rec. p. 41) and all other items claimed by appellant. The appeal to this court was prayed May 4, 1925, and allowed May 5, 1925, and the record herein filed May 11, 1925 (rec. p. 42).

2. The claims advanced and rulings made were as follows:

(*a*) The Barrett Company made a contract June 17, 1918, for the manufacture and delivery of 2,700,000

gallons of xylol for the Navy (contract, par. 1, rec. p. 10). The contract provided for the construction of a plant for its production (par. 1, rec. p. 10). The approved estimated cost was to be paid within sixty days from the signing of the contract, and it was paid. The actual necessary cost was in excess of this estimated and paid cost. The excess was $84,459.07. The contract was terminated at the close of the war after a small amount of xylol had been delivered. The Navy Department, assuming the right of cancellation (not now disputed) under the act of June 15, 1917, chap. 20, 40 Stat. 182, offered as "just compensation" on cancellation claimant's expenditures for premiums on surety bond, premiums on fire and other insurance, and other minor expenditures. Claimant asserted that "just compensation" included its expenses for the construction of the plant in excess of the approved estimated amount. The Court of Claims added a few items to those allowed by the Navy Department but refused the above item for excess expenditure on the plant.

(*b*) The claim was advanced, amended petition, foot p. 6 of record, that interest was allowable upon the sum due as "just compensation" for the contract from the date of cancellation thereof. The court without specially referring to this claim denied it in effect by allowing no interest whatever on the small amount of $10,995.08, practically conceded to be due, and for which the court entered judgment.

3. The statutory provision under which the jurisdiction of this court is invoked is Section 242 of the Judicial Code:

"An appeal to the Supreme Court shall be allowed * * * on behalf of the plaintiff in any case where the amount in controversy exceeds $3,000 * * *."

The right to this appeal was saved by the act of February 13, 1925, chap. 229, Sec. 14, 43 Stat. 936, 942, since the case was pending in this court at the time of the taking effect of that act.

STATEMENT OF THE CASE.

The Question Involved.

The case involves the determination of what is just compensation to this appellant upon the cancellation by the Navy of a contract for the production and delivery of 2,700,000 gallons of xylol.

Act of June 15, 1917.

The statute, under which the contract was cancelled, and which provides for just compensation to the contractor, is the Act of June 15, 1917, chap. 29, 40 Stat. 182. In so far as material to this case, it reads as follows:

> "The President is hereby authorized and empowered within the limits of the amounts herein authorized—
>
> "(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.
>
> "(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.
>
> * * * * * * *
>
> "Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof, or any ship, char-

ter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; * * *."

Contentions of Appellant.

First. Just compensation for the cancellation of its contract with the Navy includes reimbursement for all expenses incurred in performing or preparing to perform the contract.

Second. Just compensation includes interest from the date of cancellation to the date of payment.

Contract of June 17, 1918.

The Barrett Company June 17, 1918, made a contract with the Navy to manufacture and deliver 2,700,000 gallons of xylol. For this purpose it agreed to construct a plant with sufficient distillation apparatus to produce at least 225,000 gallons per month. The Navy agreed to advance to claimant a sum equal to the approved estimated cost of said plant and thereafter to pay for the xylol as delivered certain sums intended to cover production costs, overhead, profit and use of patents (contract, par. 1, p. 10). The estimated cost was to be submitted to the Navy for approval prior to the contract being executed (rec. middle p. 10. The company agreed to produce the maximum possible amount of xylol of the grade specified by the Navy (par. 3, middle p. 11).

The xylol provided for in the contract was to be employed in the manufacture of trinitroxylol for use in mine barrage in the North Sea and was a product requiring knowledge and skill in its manufacture (Finding II, near foot p. 30).

Barrett was to use its best endeavors with the

assistance of the Navy to have the plant and equipment ready for operation within five (5) months from the date of the contract and "the contract shall continue in full force and effect until 2,700,000 gallons of xylol shall have been delivered to E. I. du Pont de Nemours and Company as hereinafter stipulated" (rec. middle p. 12, par. 7 of contract).

The entire plant and equipment were to be the property of the Navy (par. 9, near foot p. 12).

Immediately upon the conclusion of this contract, the company was to offer the Navy for the plant twenty-five per cent (25%) of its original approved estimated cost, which offer the Navy had the option of accepting or rejecting (contract, par. 9, pp. 12, 13).

The contract contained no provision for termination.

Proceedings Under the Contract.

Barrett submitted itemized estimates of the cost of the plant aggregating $253,321.12, which amount was approved by the Navy (Finding II, top p. 31).

On May 18, 1918, one month before the contract was formally executed, the Navy notified Barrett that its offer for the construction and operation of a plant for the production of xylol was generally satisfactory to the Navy, and authorized and directed the Company to proceed immediately with the construction of the plant (Finding III, middle p. 31).

Upon receipt of the above notice, Barrett immediately proceeded to procure material. The distillation plant was completed and the manufacture of xylol commenced about September 19, 1918. The total cost of the plant was $337,780.19, or $84,459.07 more than the estimates submitted by Barrett (Finding III, middle p. 31).

The actual cost of constructing the plant exceeded the estimated cost for the following reasons (last par. Finding III, p. 31):

"The increased cost of construction was due to increases in the cost of labor and materials, and a change in construction from steel and brick to reinforced concrete and brick due to inability to secure steel, and to certain changes in the tanks as originally proposed in order to increase their capacity. None of these changes were either directed, authorized, or approved by the Navy Department, but it does appear that the department had knowledge of the changes and made no objection thereto."

Barrett began the production of xylol on September 19, 1918, two months before the agreed five months from date of contract. From that date to November 19, 1918, the company produced and delivered in accordance with the terms of the contract, 191,330 gallons (Finding IV, 1st par. near foot p. 31). This quantity constituted about seven per cent of the entire production called for by the contract and was paid for in accordance with its terms. The profit realized by Barrett aggregated $7,195.59 (Finding V, near top p. 33). No further xylol was produced under the contract.

Cancellation of the Contract.

While the work was in progress, the Paymaster General of the Navy wrote the company November 18, 1918, directing it to discontinue the manufacture of xylol (Finding IV, pp. 31–33).

Purchase of Plant.

The Navy, under the terms of the contract, became the owner of the plant (par. 9 of contract, foot p. 12).

Barrett agreed that "immediately upon the conclusion of this contract," it would offer the Navy for the plant twenty-five per cent of the original approved estimated cost, the Navy to have the option of accepting or rejecting the offer.

After some negotiations, not shown by the record, a supplemental agreement was entered into on December 1, 1920 (pp. 18, 19), for the purchase of the plant by Barrett for the sum of $115,806.66, afterwards reduced to $110,000. The supplemental contract contained the following paragraph (rec. p. 19):

"It is further agreed that this supplementary contract does not prejudice the right of the contractor to secure payment of claims in settlement for the termination of the original contract No. 38925 by the Government."

Judgment of the Court.

The opinion of the court, rec. pp. 39–41, is reported 60 C. Cls. 343. It holds on authority of decisions of this court hereinafter referred to that the action of the Navy on November 18, 1918, constituted a lawful cancellation of the contract under the terms of the act of June 15, 1917, *supra*. It allowed the company the following items of cost in performing or preparing to perform the contract:

Premium on surety bond, Finding VI, p. 33	$2,508.67
Premiums on fire and other insurance for protection of the plant, Finding VII, p. 33	3,990.95
Experimental and research work, Finding VIII, foot p. 33	3,653.85
Services after the termination of the contract, Finding IX, top p. 34	841.61
Total	$10,995.08

No other items, interest or further amounts were allowed.

The court refused to allow the additional expenditure in the construction of the plant over and above the estimated cost on the ground that it was a "departure from the contract although considered by the contractor at the time as expedient and in promotion of the rapid completion of the whole contract" (rec. near foot p. 40 of opinion).

Weight is also given (foot p. 40 and top p. 41) to the supplemental agreement of December 1, 1920, for the purchase of the plant by Barrett for $110,000 (pp. 18, 19).

The court, therefore, entered judgment February 16, 1925, for $10,995.08 (top p. 42).

Assignment of Error.

Appellant hereby assigns the following errors in the rulings and judgment of the Court of Claims:

1. The court erred in holding that the supplemental contract of December 1, 1920, is a bar to appellant's claim for reimbursement for expenditures made in connection with the erection of the plant.

2. The court erred in failing to allow appellant, as just compensation for cancellation of the original contract, in addition to other items allowed by it, the sum of $84,459.07, representing expenditures incurred by appellant in the erection of the plant, over and above the estimated cost thereof.

3. The court erred in failing to allow interest on the sum included in the judgment.

BRIEF OF ARGUMENT.

POINT I.

The supplemental agreement of December 1, 1920, is not a bar to the present suit.

In the original contract of June 17, 1918, Barrett agreed to offer the Navy for the plant twenty-five per cent of its original estimated cost, it being optional with the Navy whether to accept or reject such offer. The original cost of the plant was estimated at $253,321.12, twenty-five per cent of which is $63,330.28.

By the supplemental agreement of December 1, 1920, appellant agreed to purchase the plant for $115,806.66, though the price was ultimately reduced to $110,000.

Appellant thus paid for the plant nearly $50,000 more than was contemplated in the original agreement. As previously stated, the supplemental agreement contained the following paragraph:

"It is further agreed that this supplementary contract does not prejudice the right of the contractor to secure payment of claims in settlement for the termination of the original contract No. 38925 by the Government."

Notwithstanding this express reservation of appellant's rights and notwithstanding the fact that the purchase price of the plant was far in excess of what was contemplated by the original agreement, the Court of Claims said with respect to the supplemental agreement (rec. near top of page 41):

"In many respects this transaction alone would be sufficient to preclude the recovery claimed for this item of loss. It was a final adjustment of losses with respect to this particular controversy."

This statement is wholly erroneous and to so construe the supplemental agreement is to contradict its plain terms.

In *Cramp* v. *U. S.* 216 U. S. 494, a reservation of existing claims excepted out of an otherwise final settlement was held valid and was enforced. That case is controlling here.

Point II.

Appellant is entitled to recover the difference between the actual cost of the plant and the estimated cost thereof.

The original agreement provided that Barrett should construct for the Navy a plant of sufficient proportions to produce at least 225,000 gallons of xylol per month provided the Navy would advance to the Barrett Company a sum equal to the approved estimated cost of such plant.

The estimate submitted by Barrett and approved by the Navy was $253,321.12. The total cost of the plant was $337,780.19, or $84,459.07 more than the estimate submitted by Barrett. The increased cost of construction was due to the following causes:

(1) Increase in the cost of labor and material;

(2) A change in construction from steel and brick to reinforced concrete and brick, due to inability to secure steel;

(3) A change in the tanks as originally proposed, in order to increase their capacity.

All of these changes inured to the benefit of the Navy, and, while they were not authorized by the Department, it had knowledge of them and made no objection thereto.

The question is whether the appellant is entitled to

recover the so-called excess expenditures as part of its just compensation for cancellation.

In deciding the question against appellant, the Court of Claims said (p. 40):

"It is true the plaintiff, because of emergency conditions, determined to go beyond its express warrant of authority and incur added expense in the construction of the desired plant, but the contract itself contemplated no such increased expense and there were manifestly no contractual obligations imposed upon the plaintiff to do what it did do. But, says the plaintiff, except for the exercise of the right of termination, the additional expense of construction would have been amortized in the total profits received upon completion and therefore becomes a sum indispensably necessary to make the plaintiff whole. Apparently a sufficient answer is the assumption of such risk by the plaintiff. The right to terminate under the statute was part of the contract and an unauthorized expense incurred depended for reimbursement upon the contingency of its exercise. What the plaintiff did, over and above the limitations of its contractual obligations and rights, it did of its own free will and assumed the hazards of recouping the same out of its final profits, in the event the contract proceeded to conclusion."

The contractor is thus made to lose at both ends of the contract.

The contract guaranteed its continuance in full force and effect until the whole 2,700,000 gallons of xylol should be produced. The additional cost of construction would in that event have been amortized in the total profits received upon completion. Under decisions of this court (*post*, pp. 15–18), holding that the Secretary of the Navy had power to cancel any such contract as this, notwithstanding the absence of any provisions of cancellation in the contract itself, these profits can not be recovered.

As the contract was validly cancelled by the Secretary of the Navy subject to an obligation to make "just compensation," the contractor asks to be made whole on his necessary expenditures in preparation to fulfill the contract. This claim is denied on the ground that the expenditures were made over and above the strict requirements of the contract, and that though they were necessary to its fulfillment, the contract makes no provision for reimbursement. On this point the Court of Claims said (p. 40):

"The contract fixes the status of the parties thereunder. If one goes beyond its terms it is difficult to perceive how financial obligations to pay more than is agreed to be paid can be inferred on the single theory that the defendant in the exercise of a lawful right terminated all further proceedings under the same and is held thereafter to account for no more than just compensation. In view of the cases cited the just compensation to be awarded must be a loss lawfully resulting from performance of the contract according to its terms, and may not embrace one occasioned by the contractor's departure from the contract, although considered by the contractor at the time as expedient and in promotion of the rapid completion of the whole contract."

Thus the contractor loses at both ends. He has spent about $85,000 of his money in furnishing the Government with a first class plant for the purposes of the contract. He can neither get it back as expenditure because the contract does not provide for reimbursement, nor as anticipated profits because the contract has not been broken but has been cancelled.

Evidently there must be some flaw in the reasoning leading to such an inequitable conclusion.

Nature of the Contract.

The contract was two-fold, but indivisible, looking toward the attainment of one object, namely, the production for the Navy of 2,700,000 gallons of xylol. Appellant was not in the business of erecting xylol plants. Nor was the Navy in the business of owning and operating such plants. The contract covered both the erection of the plant and the production of xylol. It was not two separate contracts, but one contract for the purpose of obtaining one objective. It is wholly unlikely that either party would have entered into a contract covering only the erection of the plant. Appellant certainly would not have made a contract based upon the estimated actual cost of erecting the plant with no margin of profit, except in consideration of the latter part of the contract relating to the production of xylol, from which it expected to make a profit. It must, therefore, constantly be borne in mind that the contract included both the erection of a plant and the production of xylol, the latter being the primary object in the minds of both parties.

The court below seems to have considered only that part of the contract relating to the erection of the plant, and to have lost sight of the fact that the contract was one entire instrument covering both the erection of the plant and the production of xylol. The erection of the plant was only a means to the ultimate end. All expenditures incurred by appellant in connection with the contract were thus in reality for the purpose of manufacturing xylol for the Navy, and in this view can not be regarded as outside of the contract.

The propriety of the expenditures is not questioned. Finding III, p. 31, shows the necessity. Barrett can not be presumed to have spent $85,000 of its money in

putting up a better plant than was needed. The result shows for itself in the fact that the article required by the contract was produced in substantial quantities far in advance of the earliest stipulated time.

The presumption of the usefulness of expenditures of this kind was entertained in the leading case of *United States* v. *Behan*, 110 U. S. 338. That, it is true, was a case of breach of contract, not cancellation. The rule as to recovery of expenditures, however, remains the same. The court there said (pp. 343, 344):

"The claimant has not received a dollar, either for what he did, or for what he expended, except the proceeds of the property which remained on his hands when the performance of the contract was stopped. Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. If they were foolishly or unreasonably incurred, the government should have proven this fact. It will not be presumed."

Estimated Cost of Plant not a Fixed Price.

It is to be observed that the Court of Claims regards the so-called estimate of the cost of the plant as if it were the equivalent of a bid, or as if the contract had provided for the construction of the plant for a sum certain. There is no real justification for this position. The contract uses the word "estimated" not once, but several times, in dealing with the question of plant costs. An estimate connotes inexactness and does not pretend to be based on actual calculation. The word in itself precludes the idea of accuracy. *Gratz* v. *Kirkwood*, 165 Mo. Appeals, 196,

145 S. W. 870, 874; *Bautovitch* v. *Great South Lumber Company*, 129 La. 857, 860, 56 So. 1026; *Branting* v. *Salt Lake City*, 47 Utah, 296, 307, 153 Pac. 195; *Shipman* v. *State*, 43 Wis. 381, 389.

Furthermore, the intention of the parties, as evidenced by the contract itself, was that the contractor should be paid its actual construction costs. The Navy was to pay for the plant and supply the solvent naphtha, the functions of Barrett being to build the plant and to refine the solvent naphtha into xylol. The real purpose of the estimate was to furnish a basis for the Navy's advance to the contractor.

It follows, therefore, that we are not dealing with a case where the contractor's actual cost exceeded a definite figure specified in the contract and that we are not confronted with the rigidity which would flow from such a situation.

Just Compensation Includes All Expenses in Connection With Performance.

It is now settled law that a contractor whose contract with the Government was cancelled under the Act of June 15, 1917, is entitled, as part of just compensation, to all expenditures made by him in connection with the performance of the contract.

In *Russell Motor Car Co.* v. *U. S.* 57 C. Cls. 464, 261 U. S. 514, plaintiff contracted with the Navy to manufacture a number of gun mounts. During the course of performance, the contract was cancelled pursuant to the Act of June 15, 1917. The Court of Claims held that damages were not recoverable for breach of contract, but that the plaintiff was entitled to just compensation on account of the cancellation. Plaintiff was paid the contract price for all

gun mounts delivered, and in addition the Court allowed, as just compensation for cancellation of the contract, the following items (Finding XIV, 57 C. Cls. 476):

"Just compensation to the plaintiff company for the cancellation of said contract 1498 is $495,250.34, which amount includes determined allowance on account of raw materials purchased for the fulfillment of said contract with an added allowance for handling and other expenses in connection therewith, finished parts in their proportionate value to all the parts entering into a gun mount, cost of assembling not included, semi-finished parts on the same basis, percentage of completion considered, supplies, tools, jigs, and fixtures, subcontractors' claims paid, office supplies, rentals, amortization, installation of machinery, packing and shipping, miscellaneous expenses, and an additional allowance to cover possible contingencies not included in the itemization."

Here, every element of actual expenditure by the contractor in performance or preparation to perform is included. The only disallowance is of anticipated profits (Finding XV, 57 C. Cls. 477).

This court in general terms approved these elements, as well as the disallowance of anticipated profits, saying, 261 U. S. 517:

"The Court of Claims after hearing the case, found that just compensation for the cancellation of the contract was the sum of $495,250.34, which amount included a number of elements and items not necessary to be set forth. The court further found that if the company had been permitted to complete the contract according to its terms it could and would have earned a profit, in round figures, of $960,000, but held that the action of the Secretary of the Navy in cancelling the contract was within the authority conferred by the

statute, presently to be mentioned, and that the company consequently was not entitled to an award including anticipated profits."

In *College Point Boat Corporation* v. *United States*, 58 C. Cls. 380, affirmed 267 U. S. 12, the question was what constituted just compensation for the cancellation of a contract by which the contractor agreed to manufacture certain collision mats for the Navy. The contract contained no provision with regard to reimbursement of the contractor's expenditures. Upon cancellation under the statute, the items allowed by the Court of Claims as just compensation were as follows (58 C. Cls. 391, 392):

"The plaintiff rearranged and enlarged its plant for the exclusive purpose of performing this contract. The proof shows it to have cost $1,900, an amount clearly allowable. An expense of $641.20 was incurred as premium paid for its contract bond. This, too, is allowable.

"The plaintiff purchased a quantity of new machinery to meet the emergencies of this particular contract. It did not otherwise require the machinery and suffered a proven loss of $600 depreciation thereon. This item will be included in the damages awarded.

"The plaintiff purchased and had delivered to it $44,066.07 worth of materials. In acquiring and handling said materials it is entitled to a reasonable charge. This could not be done free of expense and the defendant conceded in its proffered offer of settlement two (2) per cent of the amount would be reasonable. This, amounting to $881.32, we think allowable. In addition to this, the plaintiff had outstanding subcontracts for material amounting to $108,990.53. All save one of these contracts were cancelled by the plaintiff and the material was not delivered, and hence not handled, and the expense incident to its purchase had been incurred and should be allowed. It was evidently not so

expensive as the item above, and a reasonable allowance therefor would, in our opinion, be 1 per centum of the total amount, or $1,089.90."

Meyer Scale & Hardware Co. v. *United States*, 57 C. Cls. 26, 48, related to a contract in which plaintiff contracted to manufacture and deliver to the Navy certain crane scales. The contract was terminated under the Act of June 15, 1917, when it was about half completed. The plaintiff was paid the contract price for all scales delivered. As just compensation for cancellation of the contract, the Court of Claims allowed the following items (p. 48):

"By our conclusion of law based on Finding VII we allow the plaintiff $10,888.06 on account of materials procured for and necessary to the full performance of this contract, which is all that is claimed on this account. This amount represents $11,774.40 worth of materials, with a salvage value of $886.34 deducted. It is difficult to comprehend how materials of this class, costing $11,774.40 could have a salvage value of only $886.34, even on falling prices, but such is the showing made by plaintiff, the defendant submitting no testimony on the question. We have also, based on the same finding, allowed $998.88 on account of special tools alleged to have been required for the making of these scales. This is upon plaintiff's showing made that tools costing $2,024.62 were worth but $104 after this contract was terminated and $998.88 of the depreciation is apportioned to the unperformed part of this contract. We have by our conclusion of law based on Finding IV allowed the plaintiff $4,966.65, covering its own estimate as to the proportion of 'general administration and overhead expenses' chargeable to this contract by reason of suspension of the work for a period of approximately two and a half months. It is safe, therefore, to say that every element of actual damage sustained by the plaintiff by reason of the modi-

fication, or, as it is called, cancellation, of this contract is covered by these awards and to the full amount claimed."

In addition to these authorities, there are two strictly analogous cases where the right of cancellation was given in the contract itself.

In *Peninsular Stove Co.* v. *U. S.*, 58 C. Cls. 36, plaintiff had entered into a contract with the Government to furnish 50 army ranges at a price of $89 each. The contract provided "It is understood that any part of this order may be cancelled at any time *without obligation to the U. S. Government.*" The contract was cancelled after the claimant had made certain expenditures in preparation for its execution, but before any of the ranges had been delivered. The Court of Claims held:

"Under the contract it was necessary for the plaintiff to expend money and get ready for its performance, which it did in good faith; and whatever money it expended for materials and labor it is entitled to recover, less the amount of the value of the materials salvaged by it."

Judgment was allowed in the amount of $11,769.83.

In *Ober* v. *Katzenstein*, 160 N. C. 439, plaintiff made a contract to sell tobacco fertilizer to defendant, with a reservation to plaintiff of the right to cancel the order at its option. The option was exercised after partial delivery. Defendant refused to pay for the goods delivered and defended by counterclaim on the following items: (1) loss on his own land by reason of failure to get the needed fertilizer, (2) anticipated profits on resales by defendants to customers, made before the cancellation, (3) expenses in preparing beds before the

revocation, which became useless because of the cancellation, (4) high priced labor held for use up to the date of cancellation. The first item was refused because the cancellation was not a breach but was permitted by the contract. The other items were held good, because the sales were made and the expenses incurred before the cancellation. "The plaintiff was liable for the loss up to the time of the notice that he would exercise the option not to ship" (p. 443). There was no express provision in that contract for "just compensation" on cancellation, but it was held on recognized principles of law that defendant must be made whole for his expenses and even his assured gains incurred up to the cancellation notwithstanding that the cancellation was permitted by the contract. The analogy to the pending case is complete.

Summary of Above Cases.

The following list shows in tabulated form the result of the above cases:

Russell Motor Car Co. v. *United States*, 57 C. Cls. 464, 475, 476, affirmed 261 U. S. 514:

Raw materials purchased,
Handling and other expenses in connection therewith,
Cost of finished parts,
Cost of semi-finished parts,
Supplies,
Tools,
Jigs and fixtures,
Subcontractors' claims paid,
Rentals,
Special machinery, by amortization,
Installation of machinery,
Packing and shipping,

Miscellaneous expenses,
Allowance to cover possible contingencies.

College Point Boat Corporation v. *United States*, 58 C. Cls. 380, 388, affirmed 267 U. S. 12:

Expense of purchasing materials,
Expense of contracting for materials,
Expenses of rearranging plant,
Premium on bond,
Depreciation on machinery purchased for contract.

Meyer Scale & Hardware Co. v. *United States*, 57 C. Cls. 26, 33, 35:

General overhead after termination,
Loss in value on materials on hand,
Loss in value on special machine tools.

Peninsular Stove Co. v. *United States*, 58 C. Cls. 36:
Expense of labor,
Expense of materials.

Ober v. *Katzenstein*, 160 N. C. 439:

Profit on resales made before cancellation,
Expenses in preparing for use of materials ordered,
Labor engaged in anticipation of performance.

Applicability of the Above Cases to the Case at Bar.

It being settled that just compensation includes expenditures made by a contractor in partial performance of a contract, the only remaining question is whether the same doctrine applies where the expenditures exceeded an "estimate" submitted by the contractor and approved by the Government prior to the execution of the contract. Here the claimant expended practically $85,000 more than the amount of the esti-

mate. Is such sum to be ignored in the determination of just compensation?

The Court of Claims held that the excess expenditures were not contemplated by the contract and that, since the contract was cancellable at the will of the Government, appellant must be deemed to have assumed the risk of not being able to recoup the expenditures through profits. We have already pointed out the doubtful major premise upon which that proposition stands; but, assuming it to be true, what follows? This is not a suit on the contract. If it were, appellant would get something by way of anticipated profits. The action is for just compensation and hence the law of contracts does not apply (*Russell* case, *supra*). Analogies are not lacking. Where a party to an unenforceable contract has partially performed, he can sue in *quasi* contract for the value of his performance and is not limited to the value assigned in the contract (*Clark* v. *United States*, 95 U. S. 539; *Quirk* v. *Bank of Commerce*, 244 Fed. 682, C. C. A. 6th Cir.; Williston, Contracts, Sec. 536; Woodward, Quasi Contracts, Secs. 104–106). This is so because he is not suing and could not sue on the contract. The same thing is true where the plaintiff is actually in default (*Dermott* v. *Jones*, 23 How. 220). Actions in *quasi* contract are based upon equitable principles; so are actions for just compensation (*Seaboard Air Line* v. *U. S.* 261 U. S. 299).

The contract can not be used to deny appellant recovery for both anticipated profits and actual expenditures. That is not just compensation.

In the *Russell*, *College Point* and *Meyer* cases, *supra*, the contracts in question provided for the manufacture and sale by the contractor of certain supplies, but contained no provision as to the erection of plant

facilities. The contractor simply agreed to deliver the goods desired by the Government. In all the cases, however, expenditures were made by the contractors in partial performance of the contract. Naturally, the contractors expected to recoup these expenditures through profits arising from the performance of the contract. There was no other way in which they could be recouped. Yet, the expenditures were allowed by the courts as part of just compensation, since, in view of the rule as to anticipated profits, there was no other way in which the contractors could be made whole. Such has been the uniform reasoning of this court and the Court of Claims.

In the case at bar, Barrett agreed to manufacture certain quantities of xylol. If the contract had stopped there, Barrett would clearly be entitled to all expenditures made by it in partial performance—including the so-called excess expenditures. Barrett also agreed, as a part of the same contract, to construct a plant for that purpose, which was to belong to the Navy. In the interests of efficiency, and to fulfill its contractual obligations to deliver xylol, Barrett exceeded the estimated cost of the plant. In so doing, the company, as stated by the Court of Claims, risked a cancellation of the contract before recoupment. But that is exactly what the contractors did in the *Russell*, *College Point* and *Meyer* cases, when they spent money in preparation for performance or in partial performance. In the *College Point* case, plaintiff spent $1,900 in "re-arranging and enlarging its plant," an item which the Court of Claims designated as "clearly allowable." In the present case, Barrett spent $84,459.53 in excess of its estimate, in enlarging the Navy's plant. That is the only distinction between the two cases.

The case comes down to this. Just compensation includes expenditures made in partial performance of a contract for supplies, which is cancelled by the Government pursuant to statutory authority. No limitation has thus far been placed upon the doctrine, but we suppose that only expenditures necessary and proper for performance would be allowable. Is a different rule applicable where a contract for supplies also provides that the contractor shall build a plant for the Government at an estimated cost and the contractor spends more than the estimate? What disposition shall be made of the excess expenditures? If necessary and proper for the performance of the contract, are they to be disallowed merely because in excess of an estimate? Why, any more than expenditures made in partial performance of an ordinary agreement to furnish supplies from a pre-existing plant?

In the *Peninsular Stove* case, *supra*, the contract gave the Government the right to cancel without obligation on its part. Notwithstanding this sweeping provision, it was held that on cancellation the contractor was entitled to recover "whatever money it expended for materials and labor" (58 C. Cls. 36). This result ignores the plain provisions of the contract in order to arrive at just compensation and to do equity. It would require less of a strain in the present case to arrive at a similar conclusion.

Inequity of the Government's Position.

Some regard should be had to the circumstances existing at the time the contract was executed. This Court knows judicially that in the spring of 1918 the fortunes of the allied nations were at a low ebb. The submarine menace was so acute that the allied navies

had agreed upon a plan to set up a mine barrage between the coasts of Norway and Scotland for the purpose of blockading the passage of German submarines from the North Sea to the Atlantic Ocean. The xylol manufactured by Barrett for the Navy was to be used as a raw material for the explosives in these mines. The need was imperative and Barrett responded to the call not only by undertaking the business, but by actually beginning the production of xylol some time before the date stipulated in the contract. To accomplish this, however, Barrett was obliged to spend some $85,000 more than the estimated cost of the plant.

Then came the cancellation of the contract. The opportunity to recoup the excess expenditures through profits had gone. In the meantime, the Navy, while not specifically authorizing the expenditures, had stood by and permitted them to be made, with its full knowledge, upon a plant which it was to own upon completion. We can conceive of nothing more inequitable than the Government, eight years after the Armistice, interposing a technical defense to a claim for just compensation based upon these actual outlays of capital.

As far as the books disclose, no contractor has ever been denied his actual expenditures in connection with a contract cancelled pursuant to statutory authority. We earnestly submit that this is not a case in which an exception should be made to that salutary rule.

Should defendants' contention be upheld, the result would be that claimant, without fault, through having acted reasonably and in good faith in preparing to produce xylol in the best, quickest and most economical manner for the Navy's benefit, would be left with a substantial loss upon the unexpected termination, although the right to cancel was conditioned on just compensation.

Point III.

Appellant is entitled to interest upon such award as may be made by this court from the date of cancellation to the date of payment.

The amended petition (at end, rec. p. 7) claims interest. It was not, however, allowed by the Court of Claims.

Interest is allowable on the same principle on which this court has allowed interest on the requisitioning of any private property, including contracts.

The statute by virtue of which this contract was cancelled requires that the United States "shall make just compensation therefor." As "just compensation" when used in other statutes requires the allowance of interest in order to produce the full equivalent of value paid contemporaneously, such allowance is equally required where there is a statutory provision for "just compensation."

Seaboard Air Line Railway Co. v. *United States*, 261 U. S. 299, was a suit against the United States for land taken for public uses. Although the statute under which the property was taken made no provision in respect of interest, this court said (p. 304):

"Just compensation is provided for by the Constitution and the right to it can not be taken away by statute. Its ascertainment is a judicial function."

The conclusion was (foot p. 306):

"The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled."

In *United States* v. *Benedict*, 261 U. S. 294, the decision was the same.

In *United States* v. *New River Collieries*, 262 U. S. 341, this court affirmed a judgment for the value of coal taken by the United States with interest thereon. The District Court after receiving the mandate amended the judgment by making it bear interest to the date of payment, 300 Fed. 333.

In *Brown* v. *United States*, 263 U. S. 78, the question of interest as necessary to make "just compensation" to an owner was thoroughly considered, pp. 84 to 88, and the allowance of interest sustained.

Brooks-Scanlon Corporation v. *United States*, 265 U. S. 106, was, like this case, a case of expropriation of a contract. The only difference is that the contract there taken was between private parties, while in this case the contract taken was between the United States and a private party. It was under the same statute. Both parties appealed from the Court of Claims, the appeal of the United States being based on the sole ground that the Court of Claims had allowed interest.

This court affirmed the decision below on the allowance of interest, saying (p. 123):

"And, if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added. *Seaboard Air Line Ry. Co.* v. *United States*, *supra; United States* v. *Benedict*, 261 U. S. 294, 298; *Brown* v. *United States*, 263 U. S. 78."

The appellant in the case at bar can not recover for breach of contract. Its remedy is limited to "just compensation," arising out of the lawful exercise of the

right of cancellation. The decisions of this court allow interest as a necessary part of "just compensation."

Conclusion.

The appellant is entitled to recover:

1. Its expenditure of $84,459.07, representing the excess of actual construction costs over the estimated cost thereof, in addition to the $10,995.08 allowed by the judgment appealed from.

2. Interest from the date of cancellation of contract, November 19, 1918, to date of payment.

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INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 105

THE BARRETT COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion below (R. 39–41) is reported in 60 Ct. Cls. 343.

JURISDICTION

The judgment was entered on February 16, 1925 (R. 42), and the petition for appeal was filed on May 4, 1925 (R. 42). The jurisdiction of this Court is invoked under Sections 242 and 243 of the Judicial Code as they stood prior to the time

the Act of February 13, 1925 (c. 229, 43 Stat. 936), became effective.

THE QUESTIONS PRESENTED

This case deals with a contract between the appellant and the United States under which the appellant agreed to construct for the Government a plant for the manufacture of xylol, and to make therein a stated quantity of that product. The United States agreed to pay a stated price per gallon for the xylol and a stated sum towards the cost of the plant. The contractor was bound to construct the plant notwithstanding the actual cost exceeded the estimate.

The main question is whether, on cancellation by the United States, under the authority of the Act of June 5, 1917, which authorized the President to cancel contracts upon just compensation being made to the contractors, the United States must pay, as part of the just compensation, the necessary outlay of the contractor for plant construction, in excess of the amount contributed by the United States, to the extent that complete performance would have resulted in reimbursing the contractor for the excess outlay.

The second question is whether the just compensation to be awarded on such cancellation should include the equivalent of interest from the date of cancellation to the date the compensation is paid.

STATEMENT

The statute to be construed is the Act of June 15, 1917 (c. 29, 40 Stat. 182, 183), the material provisions of which are as follows:

> The President is hereby authorized and empowered, within the limits of the amounts herein authorized—
>
> * * * * *
>
> (b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.
>
> * * * * *
>
> Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just conmpensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The findings of fact (R. 30) show that on June 17, 1918, the appellant entered into a contract with the United States, through the Navy Department, which is set forth at length as Exhibit "A" to the petition. (R. 7.) This contract provided that (R. 10):

> The Barrett Company shall construct at Frankford, Pennsylvania, for the Navy, a plant with sufficient distillation apparatus and the necessary accessories to enable it * * * to produce at least 225,000 gallons per month of Xylol for the Navy Department.

No further description of the plant was contained in the contract. The contractor also undertook to manufacture in the plant and deliver to the United States 2,700,000 gallons of xylol (R. 10, 11), at the rate of at least 225,000 gallons per month. Prior to the execution of the contract, the contractor submitted an estimate of cost of the construction of the plant, which was $253,321.12 (R. 31), and which was approved by the Navy Department. The United States agreed to advance and pay to the contractor this approved estimated cost (R. 10, 12), and, in addition, was to pay to the contractor a stated price per gallon for the 2,700,000 gallons of xylol to be delivered, in the computation of which price there was included 6.6 cents per gallon to cover "overhead, profit, and use of patents," the balance of the price being intended to cover operating or manufacturer's cost of production. It was provided that when the contract was performed the plant

should belong to the Government (R. 12); that upon the conclusion of the contract the contractor would offer to buy the plant from the United States for not less than 25% of the "original approved estimated cost" (R. 12). The contractor was not given the right to buy at that figure, and the United States was at liberty to sell the plant at the best price obtainable. It was provided that by-products should belong to the United States, but that the contractor, with the consent of the Navy Department, could sell the by-products to third persons, retaining 10% and accounting to the United States for 90% (R. 11).

The contractor proceeded to erect the plant and actually produced and delivered 191,330 gallons of xylol. (R. 31.) The contract was canceled and terminated by the United States under date of November 18, 1918. (R. 32.) The cost of construction of the plant was $84,459.07 more than the original estimated cost which the United States had agreed to advance toward the construction cost. This increased cost was due to three causes: First, increase in cost of labor and material; second, the necessity of substituting reinforced concrete and brick for steel and brick, due to the inability to secure steel; and, third, to certain changes in the tanks as originally proposed, in order to increase their capacity. (R. 31.) None of these changes was directed by the Navy Department, but it does appear that it had knowledge of the changes and

made no objection thereto. No plans of the proposed plant were attached to or formed part of the contract.

The findings show that on xylol produced and delivered prior to cancellation, the contract price included payment to the contractor of a profit of $7,195.59. (R. 33.) The findings also show that if the contractor had been allowed to complete the contract and produce the balance of xylol at the contract price it would have realized on the unproduced quantity of 2,508,670 gallons a profit of $73,792.66. (R. 34.) Some by-products of xylol were produced and sold by the contractor, but the evidence did not disclose the amount or the receipts therefrom. (R. 33.) After the cancellation, and under date of December 1, 1920, the contractor and the United States entered into a supplemental agreement (R. 18) by which the United States sold to the contractor the xylol plant at a price ultimately fixed at $110,000 (R. 38). This supplemental agreement provided (R. 19):

> It is further agreed that this supplementary contract does not prejudice the right of the contractor to secure payment of claims in settlement for the termination of the original contract No. 38925 by the Government.

Thereafter, the contractor presented a claim to the Navy Department for just compensation for the cancellation. (R. 34.) This claim included an item of $84,738.85 for outlay on plant construe-

tion, which was the amount expended in excess of the original estimated cost contributed by the United States. This item was disallowed. Suit was brought in the Court of Claims in accordance with the authority granted by the Act of June 15, 1917. The Court of Claims granted judgment for $10,995.08, representing certain items of outlay by the contractor in preparation for the work, but refused to allow any amount for cost of plant construction in excess of the original estimated cost, and refused to allow interest, or the equivalent of interest, on those items which were allowed, from the date of cancellation to the date of payment.

SUMMARY OF ARGUMENT

This case is submitted upon the opinion of the Court of Claims and extracts from the brief for the United States in the Court of Claims. Without intending to prevent consideration of the case by this Court by a confession of error, there are pointed out considerations leading to the conclusion that the contractor was compelled to construct the plant by the terms of its contract, notwithstanding the actual cost exceeded the estimate; that this outlay represented a necessary expense in preparation for the performance of the contract; that interruption of performance by cancellation prevented the contractor from recouping its outlay for plant construction through the price which would have been paid for xylol produced and delivered, and that the con-

tractor is entitled as compensation to its necessary outlay for plant construction, not exceeding the amount in which it would have obtained reimbursement by complete performance.

The question of liability for the equivalent of interest from date of cancellation to date of payment depends on what is meant by the words "just compensation" as used in the statute.

ARGUMENT

This is a case which it seems proper to submit for decision of the Court, notwithstanding we are unable to support the conclusion and judgment of the Court of Claims.

In addition to the reasons supporting its decision set forth in the opinion of the Court of Claims (R. 39–41), we submit the following extract from the brief for the United States in the Court of Claims, which contains the substance of the argument advanced by the United States in that court to support the judgment which was rendered.

> It is believed that the decision as to whether plaintiff is entitled to reimbursement for the excess cost of the plant does not involve a determination of the elements of just compensation.
>
> The contract in this case definitely fixed an obligation upon plaintiff to build the entire plant for the amount of the approved estimated cost. This was $253,000. Plaintiff, in order to construct, expended some $80,000 in excess of the amount. That was

plaintiff's loss. Had plaintiff been able to construct the plant for less than the approved estimated cost, that would have been plaintiff's gain. There is nothing in the contract giving the Government the benefit of any saving in cost, nor giving plaintiff the right to reimbursement in the event of a loss.

The only contention that plaintiff can make to justify its reimbursement for this loss is that the cancellation prevented the earning of profits out of which plaintiff might have reimbursed itself for this loss. The cancellation of the contract took plaintiff's rights to so earn and reimburse it might be contended. But if the act must be read into the contract—and the decisions so indicate—then plaintiff had no right to continue production to a point sufficient for the earning of profits to reimburse its loss on plant construction.

Plaintiff knew or should have known when it undertook the obligation that cancellation might come at any time.

The payment of the excess cost is in no way analagous to the amortization of special machinery and facilities allowed in the Russell Motor Car case. The loss on those special facilities would have been amortized over the whole number of units to be manufactured and would have constituted a part of the cost thereof, just as much as the actual components would constitute cost. The same is not true in this case. The contract provided that the approved estimated cost (not actual cost) of the plant would be

spread over the units produced to determine the payments to plaintiff, an equivalent credit being given the defendant inasmuch as the amount had already been paid. (Pages 14–15, original petition.)

The record shows that plaintiff had a previous contract for xylol production for the Navy Department. If plaintiff had lost money on that contract, it would have just as much right to reimbursement of that loss as the loss on the building part of the contract in suit.

It is not denied that plaintiff would have balanced off the contract upon completion and shown only as profit the amount left after reimbursement for the loss on the construction. This would be a sensible thing to do, and would probably have been done. But such action does not give rise to a claim for such reimbursement if the defendant, acting within its contract rights, cancels the part of the contract providing for the production of xylol, the only remaining opportunity for earning a profit. Plaintiff gambled, as all contractors gamble, on construction costs. It lost. Had it won, and made a substantial profit, the defendant could have had none of it.

On the other hand, we feel bound, in assisting this Court to reach a correct conclusion, to call attention to certain respects in which we think the decision for the United States is vulnerable.

The Court of Claims, in its opinion, treats the amount expended for plant construction by the con-

tractor in excess of the estimate as an "unauthorized expense," and as an expenditure made "of its own free will," and as beyond the terms of the contract, and states that there were "manifestly no contractual obligations imposed upon the plaintiff to do what it did do." (R. 40.)

The contract by its terms bound the contractor to erect a plant for the manufacture of xylol having a capacity of at least 225,000 gallons per month. There is nothing in the contract providing that the plant should not be built if it developed that the cost would exceed the original estimate. The contractor was obviously bound to build a plant such as was described. Its outlay, due to increased cost of labor and material and to inability to obtain steel, was necessary and compulsory and not optional. What part of the additional expense resulted from increase in capacity of the tanks is not disclosed by the findings. Since the contract did not contain any plans and specifications defining the exact construction, and since the contract called for a plant with a monthly capacity of "at least" 225,000 gallons, and since the outlay for additional tank capacity would ultimately go into the hands of the United States through its ownership of the plant, it may be inferred that the expenditure would not have been made unless reasonably necessary to the erection of a plant having a capacity of "at least" 225,000 gallons per month. The additional outlay above estimated cost was not voluntary, nor in violation of, nor in excess of the contract obligation. It was a

necessary outlay by the contractor to prepare itself to produce the xylol contracted for, and since the United States had limited its obligation to contribute to the cost of construction, the excess outlay for such purpose by the contractor could only be repaid to the contractor through the price to be paid for xylol and to the extent that that price as fixed in the contract exceeded the manufacturing cost.

While the Government's obligation to contribute toward the cost was limited to $253,000, the contractor was not limited to the expenditure of that amount and was not relieved of the obligation to erect the plant because the actual cost was found to exceed the estimate. The provision in the contract that the amount advanced by the Government should be added to the price of the xylol and that the United States would, on the other side of the ledger, be credited on the price of the xylol with the amount advanced for plant construction was a mere bookkeeping proposition designed to make it appear that the amount advanced by the United States for plant construction constituted part of the cost of the xylol. The provision for an offer by the contractor to buy the plant at completion of the contract for 25% of the estimated cost imposed no obligation on the United States to sell at that price, nor gave any right to the contractor to buy at that figure. The United States was free, at the completion of the contract, to sell the plant at the best price obtainable, and presumably it realized as

much from the sale under the supplemental agreement as could be obtained from any one; and since the supplemental agreement was by its terms without prejudice to claims for just compensation for cancellation, the provision for an offer of purchase and the actual sale may be discarded as having no bearing on the case.

The statement of the Court of Claims referring to the sale (R. 41) that "in many respects this transaction alone would be sufficient to preclude the recovery claimed for this item of loss; it was a final adjustment of losses with respect to this particular controversy," does not find support in the supplementary agreement, containing, as it did, a clause that claims for compensation were not prejudiced.

In all the cases arising under the statute above referred to, just compensation has been construed to include necessary expense and outlay in preparation for the work, for which the contractor has received no other reimbursement, provided the complete performance would have enabled the contractor to reimburse itself for such outlay.

While the contract speaks of an allowance for profit in the price for xylol, the contract was indivisible, and there was no contract profit until the price for xylol delivered was sufficient to meet the manufacturing cost of the delivered article and also reimburse the contractor for initial outlay for plant construction, and under such circumstances allowing to the contractor as compensation for

cancellation his outlay for plant construction would not be an allowance for prospective profits.

Of course, the contractor should not be put in any better position than if the contract were performed, and, in any event, its recovery should be limited to the amount in which it would have been reimbursed for plant construction by complete performance and payment of the price for xylol. The Government would also be entitled to credit for 90% of the price realized from by-products sold by the contractor before cancellation, the amount of which is not disclosed by the findings, or indeed, by the evidence in the court below. (R. 33, Finding V.)

If the case is remanded to the Court of Claims, these matters will have to be reexamined.

While the Court of Claims reached a different conclusion, we find it impossible to differentiate this case from any case where a contractor has made a necessary outlay in preparation for performance for which he is entitled to reimbursement under this statute as part of his just compensation for cancellation, provided reimbursement would have resulted, and to the extent it would have resulted, from complete performance.

The opinion of the court below and the brief for the United States in that court proceed on the theory that the contract to build the plant and the agreement to manufacture and sell Xylol were separate and distinct and that a true profit might

be made in one operation notwithstanding a loss in the other. We think the contract must be considered as a whole.

The question of interest presents another point, with respect to which the decision of the Court of Claims is open to question.

The Act of June 15, 1917, provides that, on requisition or cancellation, the United States "shall make just compensation," and if the President's determination is unsatisfactory, the Court of Claims shall determine it.

With respect to cancellation of a contract entered into prior to the passage of the statute, a cancellation amounts to an exercise of the right of eminent domain. In such a case, the words "just compensation" mean constitutional compensation under the Fifth Amendment, which is measured by the value at the time of taking, plus the equivalent of interest to the date of payment. *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299.

With respect to a contract entered into subsequent to the enactment of the Act of June 15, 1917, it has been said that the statute enters into and forms a part of the contract. *Russell Motor Car Co.* v. *United States*, 261 U. S. 514; *College Point Boat Corporation* v. *United States*, 267 U. S. 12.

From this point of view a cancellation under this statute of a contract entered into subsequent to its passage is not an exercise of the right of eminent domain, but an exercise of a contract right. Looked

at in that light, we have a contract cancelled under a contract provision that in case of cancellation the contractor shall receive "just compensation." The Court of Claims has held that Section 177 of the Judicial Code, providing that no interest shall be allowed except under a contract expressly providing therefor, prevents the inclusion of interest from the date of cancellation to the date of payment. This must be on the theory that the contract to pay "just compensation" on cancellation does not necessarily mean constitutional compensation. If the words "just compensation" as used in this statute and as applied to the case of the cancellation of a contract entered into after its passage is construed to mean constitutional compensation, as defined in *Seaboard Air Line Ry. Co.* v. *United States, supra,* the contract is one calling for payment of that just compensation, the measure of which is the value at the date of cancellation, plus the equivalent of interest on that value to date of payment.

Since the words "just compensation" as applied to a case of cancellation under the power of eminent domain of a contract made before the passage of the Act mean constitutional compensation, it results from the decision of the Court of Claims that the just compensation provided for in this statute means one thing in the case of a contract entered into before the statute was passed and a different thing when applied to a contract made after the

passage of the statute. It seems unlikely that Congress intended such a result. Although the opinion in *Russell Motor Car Co.* v. *United States, supra,* states that the statute is read into and forms part of a contract made subsequent to its passage, the decision proceeds on the theory that the just compensation to be awarded even in such a case is to be measured as if it was a requisition case under the power of eminent domain governed by the Fifth Amendment. It would have been competent for the parties in making the contract to have expressly provided that in case of cancellation just compensation should be paid and to have provided in the contract that the words "just compensation," as used therein, should be construed to mean the equivalent of just compensation under the Fifth Amendment as defined in *Seaboard Air Line Ry. Co.* v. *United States,* and if such an agreement had been made, Section 177 of the Judicial Code, forbidding allowance of interest on contracts unless expressly provided for, would not have defeated this provision of the contract. It is difficult to see why this is not just what was done, in substance, in this case.

This question of the allowance of "interest" in cases where there is a contract for "just compensation" has been causing difficulty. We call the attention of the Court to the decisions of the Court of Claims in the following cases:

A. W. Duckett & Co. v. *United States,* 58 Ct. Cls. 234. (Now pending here on certiorari,

unopposed by the United States, as No. 557, October Term, 1926.)

Charles H. Phelps et al. v. *United States*, 61 Ct. Cls. 1044. (Now pending in this Court on certiorari, unopposed by the United States, as No. 531, October Term, 1926.)

Liggett & Myers Tobacco Co. v. *United States*, 61 Ct. Cls. 693. (Now pending in this Court on certiorari, unopposed by the United States, as No. 362, October Term, 1926.)

What this Court allowed as just compensation in the *Seaboard case* does not include "interest" in any proper sense.

For further development of the subject we respectfully refer to the briefs filed for the United States in the three cases last above mentioned on the petitions for writs of certiorari.

Respectfully submitted,

WILLIAM D. MITCHELL,
Solicitor General.

JANUARY, 1927.

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SUPREME COURT OF THE UNITED STATES.

No. 105.—October Term, 1926.

The Barrett Company, Appellant, *vs.* The United States. } Appeal from the Court of Claims.

[February 21, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This is an appeal from the Court of Claims under sections 242 and 243 of the Judicial Code from a judgment of February 16, 1925, before the effective date of the Act of February 13, 1925, sec. 14, c. 229, 43 Stat. 936.

The findings of fact by the Court of Claims show that the Barrett Company, the claimant and appellant, a corporation under the laws of New Jersey, entered into a contract with the United States by which it undertook, with funds provided by the Government, to erect a plant at Frankford, Pennsylvania, for the distillation of xylol at the rate of 225,000 gallons per month, and, after completion, to operate the plant until a total of 2,700,000 gallons of xylol had been produced. The xylol was to be distilled and refined from special solvent naptha furnished by the Government and was at all times to belong to the Navy. The by-products, except what the Navy wished to retain, were to belong to the Barrett Company as part of its profit, but not to be sold without the Navy's written consent. Ninety per cent. of the by-products sold by the company was to be credited to the account of the Navy, less one cent a gallon for rental of containers used for shipment.

The price to be paid by the Navy to the company was to be determined monthly for the preceding month by the actual deliveries, first by a charge per gallon of xylol prorating the total approved estimated cost of the new plant against the 2,700,000 gallons to be made under the contract. At the same time the account of the Navy was to be credited with this charge as the total approved estimated cost would have been advanced by the United States to the company before the production of the xylol, would begin. To

cover operating cost, there was to be a charge of 3 cents per gallon of naptha distilled, and an additional charge for redistillation of fractions. These charges were to be multiplied by the gallons of naptha distilled, and the resulting aggregate was to be divided by the number of gallons produced monthly, to which 6.6 cents per gallon was to be added to cover overhead, profit and use of patents.

The new plant was to be an annex to the appellant's existing distillation plant and equipment. The estimated cost to be furnished by the Government was to be exhibited to the authorities of the Navy Department for approval prior to the execution of the contract, and was to consist of two parts. First, there was to be an itemized estimate to cover the cost of the separate unit plant and equipment, and, second, an itemized estimate to cover the cost of parts of the plant and equipment needed for the supply of electric power, steam, water, and light which would not be distinctly separate from the existing plant and equipment of the company. One-half of the sum to be advanced for construction was to be paid by the Government at the time of the execution of the contract, and the balance in two months. Plant and equipment were to be ready for operation within five months from the date of the contract and to be continued in operation until the company had delivered the full amount of 2,700,000 gallons of xylol to E. I. du Pont de Nemours and Company. The xylol provided for in the contract was to be employed in the manufacture of trinitroxylol for use in mine barrage in the North Sea and was a new product requiring knowledge and skill in its manufacture. The plant when completed was to belong to the Government. The company agreed to offer and to pay 25 per cent. of the approved estimated cost for it if accepted after the contract was performed, but the Government could dispose of it as it chose.

It was stipulated in the contract that the Barrett Company should furnish a bond for the faithful performance of the contract equal to the approved estimate of the cost of construction, that time was an essential element in the contract, that by failure to make delivery in conformity with the requirements of the contract and within the times prescribed, the United States would be damaged, that the damage should be liquidated for each day's delay at the rate of a certain per cent. of the contract price and legal excuse for delays was to be determined by the United States.

The company's estimate for the separate unit and equipment was $192,547.50, and that for the plant for supplying electric power, steam, water and light was $60,773.32, a total of $253,321.12. These estimates were approved by the Navy Department, and one-half of the cost, $126,660.56 was advanced to the plaintiff on the execution of the contract, and the remainder was paid two months thereafter.

On May 18th the Navy Department gave notice to the company that it might proceed immediately upon the construction of the plant. It did so and completed the separate plant at a cost of $284,882.66. The electric, steam, water and light plant had been, at the time of the armistice, about half constructed at a cost of $52,897.53. The total expenditure on plant and equipment by the company was thus $337,780.19, or $84,459 more than the estimates submitted by the plaintiff. The increased cost of construction was due to the increases in the cost of labor and materials and a change in construction from steel and brick to reinforced concrete and brick due to inability to secure steel, and to certain changes in the tanks as originally proposed in order to increase their capacity. None of these changes was either directly authorized or approved by the Navy Department, but it does appear that the Department had knowledge of the changes and made no objection thereto.

After the armistice, November 18, 1918, the Navy Department notified the plaintiff that the manufacture of xylol under the contract should be discontinued, that construction work remaining to be completed under the contract would not be undertaken, and the fact that the Navy would receive a partly finished plant would be considered in the final adjustment to be made with regard to the contract. The Navy thereafter discontinued further supply of naptha and work under the contract was terminated.

The Navy Department on December 1, 1918, made a supplementary agreement with the company, by which the company bought the whole plant for $110,000. This supplemental contract contained the following: "It is further agreed that this supplementary contract does not prejudice the right of the contractor to secure payment of claims in settlement for the termination of the original contract No. 38925 by the Government."

From the xylol produced and delivered for three months, the company made a profit of $7,195.59. It was testified by accountants that the profits to the company on the undelivered part would

have been $73,792.66, and that its profits from the future by-products would have been $8,237, but these results were uncertain and problematical.

The Court of Claims allowed four items claimed by the appellant, amounting in all to $10,995.08, and for this amount gave judgment.

The statute under which this contract was cancelled by authority of the President, and under which this suit was brought, provides that "whenever the United States shall cancel, suspend or requisition any contract . . . it shall make just compensation therefor to be determined by the President", and if the amount determined by him is unsatisfactory to the claimant, he may sue the Government to recover such sum as added to that which he may have already received, will be just compensation therefor. Act of June 15, 1917, c. 29, 40 Stat. 183.

The appellant makes but three assignments of error.

1. That the court held that the supplemental contract of December 1, 1920, was a bar to reimbursement of claimant for expenditures in connection with the erection of the plant.

2. That it failed to allow claimant as just compensation for cancellation $84,459.07 expended for construction of plant over and above the approved estimate.

3. That it did not allow interest on the sum included in the judgment.

First. The Court of Claims seems to have held that the supplemental contract by which the company purchased the plant for $110,000 operated as a final settlement of all claims it had against the Government. In its opinion, speaking of the purchase, it said:

"In many respects, this transaction alone would be sufficient to preclude recovery claimed for this item of loss; it was a final adjustment of losses with respect to this particular controversy."

We are unable to see that the supplemental agreement could have any such effect in view of the specific clause of the supplemental contract stipulating that the claims of the contractor should not be prejudiced thereby.

Second. The Solicitor General tenders to the Court the opinion of the Court of Claims and an extract from the brief of the United States in that court to show the argument there made against including in the recovery of the plaintiff as part of just compensation the amount expended by it in excess of the estimate

it made for the cost of the plants to be erected. The Solicitor General, however, finds himself obliged to assist the Court (and in this we think he is to be commended) in presenting a view adverse to the conclusion of the Court of Claims and to the contention of the United States in that court.

The Court of Claims in its opinion said upon this point:

"It is true the plaintiff, because of emergency conditions, determined to go beyond its express warrant of authority and incur added expense in the construction of the desired plant, but the contract itself contemplated no such increased expense, and there were manifestly no contractual obligations imposed upon the plaintiff to do what it did do. But, says the plaintiff, except for the exercise of the right of termination, the additional expense of construction would have been amortized in the total profits received upon completion, and therefore becomes a sum indispensably necessary to make the plaintiff whole. Apparently, a sufficient answer is the assumption of such a risk by the plaintiff. The right to terminate under the statute was part of the contract, and an unauthorized expense incurred depended for reimbursement upon the contingency of its exercise. What the plaintiff did, over and above the limitations of its contractual obligations and rights, it did of its own free will and assumed the hazards of recouping the same out of its final profits, in the event the contract proceeded to conclusion. It is not asserted that the contract supports the plaintiff's contention. The contention is predicated entirely upon the theory of just compensation. We have been unable to resolve the issue in plaintiff's favor. The just compensation to which the plaintiff is entitled, under the cases heretofore considered by the court, is limited to the stipulations of the contract, which by its terms imposed obligations and reciprocal rights and privileges upon the parties to the contract. The contract fixed the status of the parties thereunder. If one goes beyond its terms it is difficult to perceive how financial obligations to pay more than is agreed to be paid can be inferred on the single theory that the defendant in the exercise of a lawful right terminated all further proceedings under the same and is held thereafter to account for no more than just compensation. In view of the cases cited the just compensation to be awarded must be a loss lawfully resulting from a performance of the contract according to its terms, and may not embrace one occasioned by the contractor's departure from the contract, although considered by the contractor at the time as expedient and in promotion of the rapid completion of the whole contract."

We can not concur in this view of the effect of cancellation under the circumstances and the terms of the contract. We think, with the Solicitor General, that the provisions for the construction

of the plant and the production and payment for the product and the disposition of the by-products are all to be construed together as one contract. The main obligation of the Company and the chief purpose of the contract was to furnish to the Government 2,700,000 gallons of xylol at 225,000 gallons monthly. All else was incidental and ancillary to that. It was obliged to distill 225,000 gallons monthly in the months required. The money to be advanced by the Government was doubtless an indispensable aid to the company's fulfillment of its contract. The estimates limiting the amount were in the interest of the Government. But the possibility that the estimates might not furnish a plant of sufficient capacity to do the work within the time mentioned did not relieve the company, and if it thought a larger expenditure necessary for this, it must make it. Just compensation for cancelling the contract requires that the contractor shall be made whole and recover the expenditures necessary to perform the contract. It would have been no defense, had the company failed to perform and the Government had sued for a breach, that the plant erected upon the estimate was not sufficient to do what was agreed. That was the contractor's risk.

The contract in fixing the elements of the price per gallon of xylol speaks of adding 6.6 cents to cover overhead, profit and use of patents; but we are not concerned with profits in this case. *Russell Motor Car Company* v. *United States*, 261 U. S. 514; *College Point Boat Corporation* v. *United States*, 267 U. S. 12.

What the company is entitled to is just compensation for the contract which was taken from it, and under the cases just cited it should certainly be credited with the outlay which it can show there was reasonable ground for making in order to fulfill its engagements. On the other hand, the Government may show, without regard to the estimates, that the actual additional expenditures were really not required for the fulfillment of the contract, or if less than what was spent was needed, then how much less. The case must be remanded for new evidence and new findings on this issue.

The other assignment of error is to the failure of the Court of Claims to allow interest on that which was or should be recovered. In support of this assignment of error the appellant contends that as prospective profits can not be calculated as part of the recovery in a cancellation case, and as just compensation under the

decision in the *Seaboard Air Line* case, 261 U. S. 299, must include interest on the amount due from the time of cancellation, interest must be allowed here. The Government argues that as this contract was made after the power of cancellation was given by the statute, its provision for the cancellation must be regarded as written into the contract (*Russell Motor Car Company* v. *United States*, 261 U. S. 514; *College Point Boat Corporation* v. *United States*, 267 U. S. 12), that when so written in, cancellation is part of the risk run under the contract, and therefore that interest on the amount due under the contract can not be collected because of lack of specific agreement for it under section 177 of the Judicial Code. This exact point has never been decided by the Court. Several especially set cases are now pending in which this is the sole issue raised. As the case must go back for further consideration, we prefer to leave the point undecided and to await the argument in those cases which will probably be disposed of before the issue here will be ready for further consideration by the Court of Claims in this case.

The judgment of the Court of Claims is reversed and remanded for further proceedings.

A true copy.

Test:

Clerk, Supreme Court, U. S.